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No. 09-___

In the
# Supreme Court of the United States

ROBERT C. MCMATH,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In the criminal case below, the prosecutor used a peremptory strike to excuse an African-American prospective juror from the jury pool. Defense counsel challenged the strike as the potential product of racial bias, and the prosecutor proffered a demeanor-based explanation for the strike. The Seventh Circuit found that the district court resolved the challenge in favor of the government without making any of the findings required by this Court's decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986). But, instead of granting the defendant a new trial, the court of appeals ordered a remand "for further findings and a possible evidentiary hearing on the *Batson* issue." App. 15a.

The question presented in this petition is whether this Court's decision in *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008) requires a new trial when a trial court fails to make the findings required to support the denial of a defendant's *Batson* challenge, and where the prosecutor's race-neutral explanation cannot be confirmed or rejected on the basis of the record.

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## INTRODUCTION

This case presents a recurring question of exceptional importance that has divided the lower courts: what is the proper remedy when a trial court fails to make the findings required to support the denial of a defendant's *Batson* challenge, and where the prosecutor's race-neutral explanation cannot be confirmed or rejected on the basis of the record?

The procedure the Court established in *Batson v. Kentucky* is an attempt to reconcile the tension between the constitutional guarantee of the Equal Protection Clause and the longstanding practice of permitting prosecutors to exercise peremptory strikes at jury selection. More than twenty years of experience with that procedure have underscored the importance of the trial court in observing jury selection closely and making contemporaneous findings of fact regarding the credibility of the race-neutral explanation that a prosecutor offers when challenged on the use of a peremptory strike. As Justice Marshall observed more than twenty years ago, peremptory strikes are often the product of instincts of which the prosecutor is not fully aware, and demeanor-based explanations should be scrutinized carefully, as they are often a convenient way to hide racial prejudice.

In *Snyder v. Louisiana*, two Terms ago, this Court emphasized the "pivotal role" of trial courts in the *Batson* procedure, and ordered a new trial where the trial court had failed in its duty to make factual findings assessing the credibility of the prosecutor's race-neutral explanation for questionable peremptory strikes. As the prosecutor's explanation was based on the juror's demeanor, it could not be

confirmed or rejected on the basis of the record.

Despite the fact that *Snyder* ordered a new trial, the lower courts are divided on the question whether a new trial is necessary in similar situations, or whether it is instead permissible to remand to the trial court for retroactive findings or to conduct an evidentiary hearing to reconstruct the prosecutor's state of mind at the time of jury selection. Decisions permitting such remands have invited *post hoc* justifications for questionable peremptory strikes and have sown further confusion as litigants dispute the permissible parameters of such proceedings (such as whether and to what extent to permit discovery and whether the prosecutor may give new reasons on remand that were not given at trial). Such remands have occasionally taken on lives of their own and wasted judicial resources.

This case presents an ideal opportunity to resolve the confusion and inefficiency in the lower courts in the wake of *Snyder v. Louisiana*. It is clear from the record that (1) the prosecutor's *only* reason for striking the prospective juror was his demeanor, (2) the trial judge made no findings at all regarding the credibility of the prosecutor's explanation, stating only "[t]he *Batson* challenge is denied," and (3) the Seventh Circuit read *Snyder* as permitting the remand that it ordered. Under those circumstances, the important question in this case is clearly presented and the Court should take the opportunity to answer it.

## OPINIONS BELOW

The Seventh Circuit's decision is reported at 559 F.3d 657 (7th. Cir. 2009) and reprinted in the Appendix at 1a. The district court ruled from the

bench on Mr. McMath's *Batson* challenge, and a transcript of the relevant portion of that hearing is reprinted in the Appendix at 26a. The judgment of the district court is unreported and is reprinted in the Appendix at 71a.

## JURISDICTION

The court of appeals issued its decision on March 19, 2009. App. 1a. On June 8, 2009, Justice Stevens extended the time for filing this petition to and including August 14, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## PERTINENT CONSTITUTIONAL PROVISION

Section One of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Robert C. McMath is a twenty-two-year-old African-American male who was convicted in a one-day jury trial of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2).

### A. *Batson v. Kentucky*

As is discussed more fully in the Reasons for Granting the Petition, *Batson v. Kentucky*, 476 U.S. 79 (1986) holds that the Equal Protection Clause of the Fourteenth Amendment forbids prosecutors from using peremptory challenges to remove prospective jurors from a jury on the basis of race. *Batson* establishes a three-step procedure for trial courts to follow when a defendant asserts that a prosecutor's peremptory challenge is based on race:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

*Snyder v. Louisiana*, 128 S. Ct. 1203, 1207 (2008) (internal quotation marks omitted). This petition concerns the third step of the procedure.

### B. Factual Background

When he was eighteen years old, Mr. McMath was approached by an undercover police officer who asked if he had any marijuana. Mr. McMath provided the officer a small amount of marijuana for $20 and was convicted of felony possession with intent to deliver less than 200 grams of marijuana. He was sentenced to four months in jail and eighteen months of probation, and had his driver's license suspended for six months.

On the evening of May 8, 2007, police officers Chad Boyack and Cory Washington were on patrol and observed a car driving above the speed limit. After catching up with the car, the officers observed an object being thrown from the rear passenger window of the car. When the officers pulled the car over, they found three occupants: Carrington Ross, Tracy Dansby, and Mr. McMath. Mr. McMath presented them with his Wisconsin Department of Corrections identification card. The officers recovered a firearm that they believed had been thrown from the vehicle. The firearm had no magazine and was unloaded, and tests showed that it had no fingerprints or DNA on it. Mr. McMath was nonetheless charged with being a felon in possession of a firearm. App. 2a-3a. The United States District Court for the Eastern District of Wisconsin had jurisdiction under 18 U.S.C. § 3231.

### C. Jury Selection

On November 26, 2007, the district court held jury selection. The court called 36 prospective jurors to the courtroom. App. 3a, 27a-28a. After the court conducted voir dire, the government asked no questions and defense counsel asked a few additional questions. App. 59a-62a. No jurors were excused for cause. After five jurors were chosen at random and excused from the pool, the parties exercised their peremptory strikes. App. 66a-67a. The government used one of its peremptory strikes to excuse Juror 7, who was one of the two African-American jurors on the panel. App. 68a-69a.

Defense counsel objected, noting this Court's decision in *Batson*. The prosecutor responded that her reason for striking Juror 7 was the "expression

on his face": "He looked angry and not happy to be here." Defense counsel disputed that explanation, and the district court denied the *Batson* challenge without making any findings. The entire exchange is reproduced below.

> MR. ERICKSON: I have an issue about Juror 7, the African–American.
>
> THE COURT: All right.
>
> MR. ERICKSON: So, I mean, if you want to—do you want me to do it now?
>
> THE COURT: What is the issue?
>
> MR. ERICKSON: Yeah, I was thinking under *Batson*, obviously he's African–American. He was struck. The only information we had about him is he was retired. He worked at Social Services, janitorial. There's other jurors left on this jury that are retired. Under similar circumstances I think it would be incumbent upon the Government to raise a racially neutral factor at this point.
>
> MS. BLACKWOOD: Your honor, there are two African–Americans that were on the panel; one was struck. There is no pattern of discrimination that's been demonstrated.
>
> MR. ERICKSON: Your honor, even though one is left on, there still, I think, has to be a race neutral factor and there's not here.

> MS. BLACKWOOD: Race neutral factor is expression on his face. That's all I can say. He looked angry and not happy to be here.
>
> MR. ERICKSON: I think pretty much the whole jury looked like that.
>
> MS. BLACKWOOD: I disagree. I didn't see that expression.
>
> MR. ERICKSON: There were several people that had the same expression.
>
> THE COURT: The *Batson* challenge is denied.

App. 68a-69a. The district court said nothing further, and Juror 7 was excused. App. 4a.

### D. Trial, Sentencing and Subsequent Proceedings

After jury selection, the district court held a one-day trial. The government called three witnesses: the two police officers who stopped the car in which Mr. McMath was traveling, and an agent of the Bureau of Alcohol, Tobacco, Firearms and Explosives who inspected the site where the car was pulled over and testified about the location of street lights in the area. Mr. McMath took the stand in his defense and testified that he was in the car, but denied throwing a gun out of the window of the car and stated that he did not see anyone throw a gun out of the car. App. 5a.

The jury convicted Mr. McMath and the district court sentenced him to 63 months in prison, followed by three years of supervised release. App. 1a, 7a,

76a. The district court's sentence was based in part on its finding that Mr. McMath committed perjury by giving certain testimony about the car that was demonstrably false in light of its inconsistency with a photograph. App. 23a-24a.

Mr. McMath appealed his conviction and sentence to the Seventh Circuit. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

The court of appeals held that the district court "clearly erred in denying the *Batson* challenge without making findings regarding the credibility of the proffered race-neutral justification for the strike." App. 15a. The court held that Mr. McMath met his burden at the first step of the *Batson* procedure, *see* § A, *supra*, to show a *prima facie* case of discrimination, App. 11a, and that at the second step of the procedure, the prosecution had offered a facially race-neutral explanation for the strike. App. 12a. It was at the third step of the *Batson* procedure, however, that the district court clearly erred by overruling the defendant's objection without making findings regarding the credibility of the prosecutor's proffered race-neutral explanation. App. 15a. As the court of appeals put it, "the district court [1] did not indicate whether it agreed that Juror 7 had an unhappy expression on his face, [2] did not indicate whether this expression was unique to Juror 7 or common to other jurors, and [3] made no evaluation of the prosecutor's credibility." App. 15a. Accordingly, the court of appeals could not "presume that the prosecutor's race-neutral justification was credible simply because the district judge ultimately denied the challenge." App. 15a.

Mr. McMath argued that, under this Court's decision in *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008), the appropriate remedy for the district court's error is a new trial. The court of appeals rejected that argument and instead ordered a remand "for further findings and a possible evidentiary hearing on the *Batson* issue." App. 15a. The court of appeals also found that the district court's perjury finding was clearly erroneous and based on a misapprehension of the record. App. 23a-25a. Accordingly, the court vacated McMath's sentence and ordered a remand for resentencing in the event that the district court concluded on remand that McMath's *Batson* challenge should have been denied. App. 24a-25a.

Regarding the remand, the court instructed as follows:

> Upon remand, the district court should first determine whether it can make factual findings on the *Batson* issue. If it is unable to do so or finds that McMath's challenge was meritorious, it should vacate McMath's conviction. If the district court is able to make factual findings and holds that the Batson challenge should be denied, the district court should proceed to resentencing in light of our conclusion that the district court's obstruction of justice enhancement relied on a mistaken factual finding.

App. 25a.

Remand proceedings are ongoing.

## REASONS FOR GRANTING THE WRIT

### I. REVIEW IS NECESSARY TO CLARIFY *SNYDER V. LOUISIANA* AND TO RESOLVE A CONFLICT AMONG THE LOWER COURTS.

1. *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008) is the latest in a long line of decisions in which the Court has, for over a century, "'consistently and repeatedly' reaffirmed" that the Equal Protection Clause forbids the government from purposefully excluding people from a jury on account of race. *Batson v. Kentucky*, 476 U.S. 79, 84 (1986) (quoting *Swain v. Alabama*, 380 U.S. 202, 204 (1965)); *see generally Strauder v. West Virginia*, 100 U.S. 303 (1880). Racial discrimination in jury selection harms the defendant, violates the rights of the excluded juror, and harms the public by undermining confidence in the criminal justice system. *Batson*, 476 U.S. at 87; *Strauder*, 100 U.S. at 308. In *Batson*, the Court explained that the Equal Protection Clause applies to the prosecutor's use of peremptory challenges during jury selection, and the Court established a three-step procedure for trial courts to adjudicate a defendant's claim that a prosecutor used a peremptory challenge on the basis of race:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

*Snyder*, 128 S. Ct. at 1207 (citations and alterations omitted).

2. The *Batson* procedure is "designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process," *Johnson v. California*, 545 U.S. 162, 172 (2005), and is an effort to accommodate the inherent tension—which some Justices have called unresolvable—arising out of the coexistence of peremptory strikes and the constitutional guarantee of the Equal Protection Clause. *See, e.g.*, *Rice v. Collins*, 546 U.S. 333, 344 (2006) (Breyer, J., concurring); *Batson*, 476 U.S. at 105-06 (Marshall, J., concurring); *cf. Swain*, 380 U.S. at 244 (Goldberg, J., dissenting). When *Batson* was decided, Justice Marshall feared that it did not go far enough and would have abolished peremptory strikes altogether. He noted the difficulties of assessing the motives of prosecutors, particularly where a strike may be the product of unconscious bias, and particularly where demeanor-based explanations for peremptory strikes could easily be used to hide racial bias. 476 U.S. at 105-06 (Marshall, J., concurring).

The *Batson* majority defended its procedure, in part, by asserting its faith in the diligence and alertness of trial judges during jury selection: "Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination." *Id.* at 99 n. 22 (majority).

3. In *Snyder*, the Court emphasized that the *Batson* procedure relies heavily on the firsthand observations of trial courts, and reversed the defendant's conviction and sentence where, as here,

the trial court failed to make any findings in the court of adjudicating the defendant's *Batson* objection to the prosecution's use of a peremptory strike.

At trial, the prosecution used a peremptory strike to excuse a black prospective juror and offered two race-neutral explanations when challenged, one of which was that the prospective juror "looked very nervous." 128 S. Ct. at 1208. Defense counsel disputed those explanations and, in a manner similar to the instant case, the trial court allowed the peremptory strike without comment. *Id.* at 1208-09.

This Court found that the prosecution's first explanation—that the prospective juror had a work obligation that would conflict with jury service—could be evaluated on the basis of the record, which showed that the explanation was "implausible." *Id.* at 1210-12. Regarding the explanation that the juror looked nervous, the Court noted that there was no record of the prospective juror's demeanor, and "nervousness cannot be shown from a cold transcript." *Id.* at 1209 (quoting Louisiana Supreme Court). In the absence of express findings regarding the nervousness explanation, the Court "c[ould] not presume that the trial judge credited the prosecutor's assertion that [the juror] was nervous." *Id.*

The Court explicitly rejected the possibility of remanding for further findings on the *Batson* challenge, noting that the record did not show "that the prosecution would have pre-emptively challenged [the juror] based on his nervousness alone[, n]or [was] there any realistic possibility that this subtle question of causation could be profitably explored

further on remand at this late date, more than a decade after petitioners' trial." *Id.* at 1212. Accordingly, the Court set aside the defendant's conviction and sentence, and remanded for "further proceedings not inconsistent with this opinion." *Id.* at 1212. The Louisiana Supreme Court understood the Court's instructions to require a new trial. *State v. Snyder*, 982 So. 2d 763 (La. 2008) (characterizing the Court's holding as "effectively set[ting] aside defendant's conviction and sentence"); *see also* Paul Purpura, *Man is Recharged in Killing: Supreme Court Tossed Earlier Conviction*, THE TIMES-PICAYUNE, Jan. 30, 2009 (noting the pendency of the new trial).

4. The Court was not fully explicit in *Snyder* about whether and to what extent its decision to order a new trial instead of a remand rested on (1) the lapse of more than ten years between jury selection in the trial court and the Court's decision, or (2) the trial court's failure to make any factual findings in the course of disposing of the defendant's *Batson* objection. It is perhaps for that reason that *Snyder* has helped to deepen and crystallize a preexisting split of authority in the lower courts, as different courts have drawn different lessons from *Snyder* and reached different conclusions regarding the remedy required for a trial court's failure to make the findings required by *Batson*.

### A. After *Snyder*, The Fifth and Eleventh Circuits, and Other Lower Courts, Have Ordered New Trials.

1. Where a prosecutor's race-neutral explanation for a strike cannot be confirmed or rejected on the basis of the trial record, and where the trial court

failed to make the required findings in the course of resolving a *Batson* objection to a peremptory strike, the Fifth and Eleventh Circuits have ordered new trials. *See, e.g.*, *Haynes v. Quarterman*, 561 F.3d 535, 540-41 (5th Cir. 2009); *McGahee v. Dep't of Corrections*, 560 F.3d 1252, 1259-60 (11th Cir. 2009); *cf. United States v. Williamson*, 533 F.3d 269, 277 (5th Cir. 2008).

2. In *Haynes*, two different trial judges presided over jury selection. One judge presided at the beginning when the jurors were addressed as a group, and again at the end when the parties exercised peremptory strikes and when the defendant made the *Batson* objection at issue. The other trial judge presided during a middle stage during which the attorneys questioned prospective jurors individually. 561 F.3d at 537. During the *Batson* hearing, the prosecutor justified his challenges to two jurors solely on the basis of their demeanor in responding to questions during the middle stage of jury selection. *Id.* at 537-38. The trial judge—who had not observed the demeanor of those witnesses—nonetheless allowed the peremptory strike. The Fifth Circuit, on *habeas* review, held that that was error and that the defendant was entitled to a new trial or to release from custody. *Id.* at 540-41. In so doing, the Fifth Circuit cited this Court's guidance in *Snyder* regarding the critical role of the trial court in resolving *Batson* objections, particularly those involving demeanor-based explanations from the prosecutor. *Id.* at 540-41.

3. In *McGahee*, in a manner similar to the instant case, the trial judge failed to make any of the findings required by *Batson*, and resolved the

defendant's *Batson* objection without comment, saying only "[y]our motion is denied." 560 F.3d at 1259. After trial, the trial court asked the prosecutor for more specific reasons for its use of peremptory strikes, but again failed to make a specific ruling on the adequacy or credibility of those reasons. *Id.* at 1259-60. The failure to make any factual findings on the defendant's *Batson* objection, the Eleventh Circuit held, was an unreasonable application of clearly established federal law, entitling the defendant to a new trial. *Id.* at 1259-61. As the Fifth Circuit did in *Haynes*, the Eleventh Circuit cited this Court's guidance in *Snyder*, *id.* at 1260, 1268, 1269.

4. In *State v. Jacobs*, --- So.3d ---, No.07-KA-887, 2009 WL 1324220 (La. Ct. App. May 12, 2009), the Court of Appeal of Louisiana ordered a new trial where the trial judge resolved the defendant's *Batson* objections without comment, saying only "[t]he Court is going to deny the defense's motion." *Id.* at *9. Throughout the opinion, the court of appeal discussed this Court's opinion in *Snyder*, holding that each instance in which the trial judge denied the defendant's *Batson* objection without specifically addressing the prosecutor's race-neutral explanations constituted reversible error. *See, e.g.*, *id.* at *10 ("Yet again, the trial judge failed to specifically address the plausibility of any of the prosecutor's proffered race-neutral explanations, based on the prosecutor's credibility and the prospective juror's demeanor. This failure constituted reversible error."); *id.* ("These strikes . . . illustrate the need for the trial judge to perform his pivotal role in evaluating the claims as required by *Snyder*.").

5. In *People v. Collins*, 187 P.3d 1178 (Colo. Ct. App. 2008), the court ordered a new trial where the trial court focused more clearly on the defendant's *Batson* objection but ultimately overruled it without making any findings crediting the prosecutor's proffered race-neutral explanations. *Id.* at 1183-84. The prosecutor gave five race-neutral explanations for the peremptory strike at issue, two of which concerned the juror's demeanor. When the trial court initially indicated an inclination to sustain the *Batson* objection, the prosecutor stated that, as evidence of his lack of racial bias, he had no objection to the other African-American prospective juror serving on the panel. The trial court ultimately overruled the *Batson* objection, discussing the individual steps of the *Batson* procedure and ultimately concluding: "I'm going to find, by preponderance of the evidence, that the decision to exclude [the juror] was not motivated by racial—or because of her race. Again, I'm considering the totality of the circumstances, which I think were not present at the initial challenge." *Id.* at 1181.

The Colorado Court of Appeals reversed and ordered a new trial. The court noted that the fact that the prosecutor struck one rather than two African-American jurors was "relevant," but "not dispositive." *Id.* at 1183-84. Regarding the five race-neutral reasons the prosecutor gave for the strike, the court held that "three of the race-neutral reasons . . . are affirmatively refuted by the record, and the district court did not specifically credit the others." *Id.* at 1183. The two reasons that the trial court did not specifically credit were based on the prospective juror's demeanor and could not be confirmed or rejected on the basis of the record: the juror

allegedly had her arms crossed and slept during part of voir dire. *Id.* at 1183. Citing and discussing *Snyder*, the court of appeals refused to presume that the trial court credited the prosecutor's statements about the juror sleeping and crossing her arms where the trial court did not specifically credit those explanations and where there was some reason to believe that the trial court in fact did not credit those statements. *Id.* Accordingly, the court of appeals held—as the Seventh Circuit did in the present case—that given its lack of specific factual findings, the trial court "clearly erred in overruling the defendant's *Batson* objection." *Id.* at 1184.

Unlike the cases in which trial courts have overruled *Batson* objections without comment, in *Collins* there was greater reason to suspect that the trial court paid attention to the prosecutor and the jury pool during jury selection and might have been able to recall the event in sufficient detail if the court of appeals ordered a remand. Nonetheless, the court of appeals held that the trial court's clear error required reversal of the defendant's convictions. *Id.*

6. In a manner similar to *Haynes*, *McGahee*, *Jacobs*, and *Collins*, numerous other state and federal courts have ordered new trials when confronted with a situation where, as in this case, the trial judge has failed to make the required findings and overruled a defendant's *Batson* objection with little or no comment. *See, e.g.*, *Conway v. Dexter*, No. 00-CV-7350, 2008 WL 4814260 (C.D. Cal. Oct. 31, 2008) (on *habeas* review, ordering a new trial where "neither the trial court nor the court of appeal made any serious effort to conduct the thorough inquiry required by *Batson*"); *State v. Cheatteam*, 986 So. 2d 738, 753 (La. Ct. App.

2008) (relying on *Snyder*, court ordered new trial where prosecutor struck juror because she was rolling her eyes, but the trial court did not, through explicit findings, "verify the aspect of the juror's demeanor upon which the prosecutor based his or her peremptory challenge"); *cf. People v. Gonzales*, 81 Cal. Rptr. 3d 205, 214 (Cal. Ct. App. 2008) (reversing for a new trial after *Snyder* where "[t]he trial court . . . did not sufficiently question and evaluate the prosecutor's exercise of his peremptory challenges").

### B. After *Snyder*, The Second, Seventh and Ninth Circuits, and Other Lower Courts, Have Permitted Remands For Further Findings.

1. In contrast to the cases discussed above, the Second, Seventh and Ninth Circuits (the latter in an unpublished opinion), and other lower courts, have remanded to the trial court to allow the trial court to make retroactive factual findings or to hold evidentiary hearings to reconstruct the prosecutor's state of mind at the time of jury selection. In the instant case, the Seventh Circuit seemed to assume that the Court's decision in *Snyder* to set aside the conviction instead of remanding for further findings rested solely on the fact that more than ten years had passed since jury selection. App. 16a. Purporting to distinguish *Snyder*, the court surmised that "remand may be more worthwhile in this case, as voir dire occurred only a little over a year ago." *Id.*

Other courts have reached the same result, either using similar reasoning or simply ordering remands without directly addressing the appropriateness of that remedy. *See, e.g., Love v.*

*Scribner*, 278 Fed. App'x 714, 718 (9th Cir. 2008) (remanding for an evidentiary hearing after *Snyder* where the trial court prevented the defendant from "elicit[ing] the facts that would have allowed the trial court [and appellate courts] to evaluate the alleged similarities" between jurors who were struck and jurors who were not struck).

3. In *Dolphy v. Mantello*, 552 F.3d 236 (2d Cir. 2009), the prosecution used a peremptory strike to remove an African-American prospective juror. When challenged, the prosecutor stated that he struck the juror because she was overweight and because, in the prosecutor's experience, "heavy-set people tend to be very sympathetic toward any defendant." *Id.* at 237. The trial court overruled the defendant's *Batson* objection, stating only that "I'm satisfied that is a race neutral explanation." *Id.* at 237. On *habeas* review, the Second Circuit could not "say that the trial court properly applied *Batson*." *Id.* at 239. "Because the trial court failed to assess the credibility of the prosecution's explanation," the court held, "it follows that there was no adjudication of [the defendant's] *Batson* claim on the merits." *Id.* The court therefore remanded to the district court, stating that it "may, in its discretion, hold a hearing to reconstruct the prosecutor's state of mind at the time of jury selection . . . or, if the passage of time has made such a determination impossible or unsatisfactory, the district court may grant the writ [of *habeas corpus*] contingent on the state granting [the defendant] a new trial." *Id.* at 240.

4. In *United States v. Taylor*, 509 F.3d 839 (7th Cir. 2007), a case decided before *Snyder*, the Seventh Circuit was confronted with evidence that the prosecutor's peremptory challenge was based on

race, and the district court had failed to make findings at the third step of the *Batson* procedure. *Id.* at 844-45. The court of appeals ordered a remand "for the limited purpose of supplementing the record with [the district court's] findings about whether the government's stated reason for exercising a peremptory challenge against Watson is credible, or whether the defendants met their burden of demonstrating discrimination." *Id.* at 845-46. On remand, the district judge reviewed transcripts and issued a short statement to the effect that he remembered jury selection (which had occurred nearly 4 years prior) and concluded, based on his recollection of the prosecutor's demeanor and arguments, the prosecutor was credible. Statement, *United States v. Taylor*, No. 01-CR-73, (N.D. Ind. Jan. 17, 2008) (Docket Entry No. 1026).

The case returned to the Seventh Circuit, *Snyder* having issued in the interim, and the Seventh Circuit ordered a second remand, noting that the district court failed to address the fact that the prosecutor's race-neutral explanation appeared to be implausible in light of the record. Specifically, the race-neutral explanation seemed to apply equally to some of the Caucasian prospective jurors, whom the prosecution did not attempt to remove from the jury. *United States v. Taylor*, 277 Fed. App'x 610, 612-13 (7th Cir. 2008). Accordingly, the court of appeals remanded "for the court to conduct an evidentiary hearing and to determine de novo whether the *Batson* challenge has merit." *Id.* On remand, the district court again accepted the government's explanation and upheld the defendants' convictions and sentence, 604 F. Supp. 2d 1210 (N.D. Ind. 2009).

The case is now on its third appeal, No. 09-1291, to the Seventh Circuit.

5. Other lower federal and state courts have joined the Second, Seventh, and Ninth Circuits in ordering remands instead of new trials. As noted, some of those opinions—such as the Seventh Circuit's opinion in the instant case—appear to order remands based on the belief that this Court's decision not to order a remand in *Snyder* rested solely on the fact that more than ten years had passed since jury selection. *See, e.g.*, App. 16a; *Kassem v. State*, 263 S.W.3d 377, 383 (Tex. Ct. App. 2008) (remanding for the intermediate appellate court "to conduct a full *Batson* hearing and to enter findings of fact and conclusions of law or to make a determination that such a hearing would not be practicable, in which case the [court] should remand for a new trial."). Other opinions, however, call for remand proceedings—or evidentiary hearings, in the case of federal courts exercising *habeas* review—several years after jury selection without any apparent consideration of the choice of remedy this Court made in *Snyder*. *See, e.g.*,. *Patterson v. Alameida*, No. 02-CV-2321, 2008 WL 2326295 at *15 (E.D. Cal. June 3, 2008) (ordering an evidentiary hearing eight years after jury selection); *People v. Davis*, 899 N.E.2d 238, 249-50 (Ill. 2008) (ordering a remand four years after jury selection); *Taylor*, 277 Fed. App'x at 612-13.

### C. After *Snyder*, The Eighth Circuit Has Held That No Error Occurs At All When A Trial Court Fails to Make Explicit Findings.

1. Further demonstrating the degree of doctrinal confusion in the lower courts after *Snyder* is the fact that the Eighth Circuit does not read *Snyder* as requiring explicit findings by the trial court at all. *See Smulls v. Roper*, 535 F.3d 853, 860 (8th Cir. 2008) (en banc) ("In fact, federal law has never required explicit fact-findings following a *Batson* challenge, especially where a *prima facie* case is acknowledged and the prosecution presents specific nondiscriminatory reasons on the record."), *cert. denied*, 129 S. Ct. 1905 (2009) (habeas case); *United States v. Grant*, 563 F.3d 385 (8th Cir. 2009) (applying *Smulls* on direct review of a criminal conviction). The Eighth Circuit apparently stands alone in this regard. In sharp contrast to the instant case, App. 15a, and to *Snyder*, 128 S. Ct. at 1209, where the Seventh Circuit and this Court both refused to presume that the trial court credited the prosecutor's proffered race-neutral explanation where the trial court denied the *Batson* challenge without making specific findings, the majority in *Smulls* apparently takes the opposite view, explaining that "[a] trial court's ruling on a *Batson* challenge is itself a factual determination, and we have repeatedly upheld rulings made without additional reasoning." 535 F.3d at 860.

2. The *Smulls* majority distinguished *Snyder*, noting that "a number of factors" led the Court not to presume that the trial court credited the prosecutor's proffered race-neutral reason for exercising a peremptory challenge. 535 F.3d at 860-61. The

majority focused on the fact that in *Snyder* the prosecutor gave *two* reasons, one of which was belied by the record and the other of which was demeanor-based. *Id.* In *Smulls*, by contrast, neither of the prosecutor's nondiscriminatory reasons is as suspect as the prosecutor's reason in *Snyder*, and the court therefore held that "the trial court's failure to make explicit findings [does not] relieve this court of its obligation to view the state trial court's findings as presumptively correct." *Id.* at 861.

3. Although there is some language in *Smulls* to suggest that its holding was based on the AEDPA standard of review, *id.* at 861 ("In any event, *Snyder* was not clearly established law at the time of the state courts' rejection of Smulls' *Batson* claim . . ."), the Eighth Circuit subsequently applied *Smulls* on direct review in *United States v. Grant*, 563 F.3d 385 (8th Cir. 2009). In *Grant*, the court of appeals examined a case in which the defendant argued on appeal that the district court did not make detailed findings at step three of the *Batson* procedure. In rejecting the defendant's arguments, the majority in *Grant* cited *Smulls* repeatedly for the proposition that trial courts are not required to make findings of fact in the course of ruling on a *Batson* challenge. *See id.* at 389 ("A trial court's ruling on a *Batson* challenge is itself a factual determination. [F]ederal law has never required explicit fact-findings following a *Batson* challenge, especially where a prima facie case is acknowledged and the [non-moving party] presents specific nondiscriminatory reasons on the record.") (quoting *Smulls*, original alterations); *id.* at 390 n.3 (quoting the same language from *Smulls*); *id.* at 391 n.5 ("The district court's analysis did not have to address, or make

specific factfindings on, all of Grant's counsel's reasons for striking Juror Ham. *See Smulls*, 535 F.3d at 860."); *id.* at 392 n.6 ("The district court was not required to make specific factfindings, or provide explanation, on each reason offered by Grant's counsel. *See Smulls*, 535 F.3d at 860."). Both *Smulls* and *Grant* drew spirited dissents from Judge Bye. *Smulls*, 535 F.3d at 868-74 (Bye, J., joined by Smith, J., dissenting); *Grant*, 563 F.3d at 394-99 (Bye, J., dissenting). In *Smulls* in particular, Judge Bye described the inconsistency between the majority's opinion and *Snyder* and rebutted the grounds on which the majority sought to distinguish *Snyder*. 535 F.3d at 870-73 (Bye, J., dissenting).

* * *

There is significant confusion among the lower courts on the answer to the question presented in this petition. Although the split predates *Snyder*, *compare, e.g.*, *Wright v. State*, 586 So. 2d 1024, 1039 (Fla. 1991) (new trial); *Bernard v. State*, 659 So. 2d 1346, 1348 (Fla. 5th DCA 1995) (new trial), *with People v. Johnson*, 136 P.3d 804, 808 (Cal. 2006) (remand for further findings); *United States v. Taylor*, 509 F.3d 839 (7th Cir. 2007) (same), as the authorities discussed above demonstrate, *Snyder* has brought the issue into sharp focus and further deepened the confusion among the lower courts. There is now a mature three-way split of authority that includes both the federal and state courts, and this petition presents an ideal opportunity for the Court to resolve the confusion.

## II. Review is Necessary To Resolve An Important Issue That Has Generated Significant Inefficiency in The Lower Courts.

The practice of allowing remands for further findings on a defendant's *Batson* challenge has proven to be unworkable in practice and has caused significant inefficiency in the lower courts.

1. A remand for further findings invites *post hoc* justifications from prosecutors and judges. At the third step of the *Batson* procedure, the trial judge must assess the plausibility of the prosecutor's race-neutral explanation "in light of *all* evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. 231, 251 (2005). The *Batson* majority described it as a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 476 U.S. at 93. In the present case, as the Seventh Circuit explained, the district judge was asked to recall—more than a year after jury selection in a one-day trial—the stricken juror's facial expression, whether the stricken juror's facial expression was the same or different from the facial expressions of the jury pool, and the prosecutor's demeanor at the time of the strike. App. 15a. The Court recognized in *Snyder* that, where more than a decade had passed between jury selection and the Court's decision, there was no "realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date." 128 S. Ct. at 1212. Yet, given the typical timing of the appellate review process, and the sensitivity of the inquiry, the Court's observation in *Snyder* applies equally well to more typical cases. More often than not it is an unreasonable request to make of trial

courts to ask them to recall such subtle details more than a year afterward.

2. When the trial court conducts an evidentiary hearing on remand, the proceeding imposes an unreasonable burden on judges, prosecutors and defense attorneys. As several Justices of this Court have recognized, peremptory challenges are often the product of "seat-of-the pants instincts" that defy articulation and that are based on reasons of which the prosecutor may not be fully aware. *Batson*, 476 U.S. at 136 (Rehnquist, J., dissenting). As Justice Breyer put it, "at step three, *Batson* asks judges to engage in the awkward, sometime hopeless, task of second-guessing a prosecutor's instinctive judgment—the underlying basis for which may be invisible even to the prosecutor exercising the challenge." *Miller-El v. Dretke*, 545 U.S. at 267-68 (Breyer, J., concurring) (citing legal and psychological literature); *see also Batson*, 476 U.S. at 106 (Marshall, J., concurring) (noting the potential effects of unconscious racism and stating that "[e]ven if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet").

If the task of second-guessing a prosecutor's instinctive judgment is "awkward" and sometimes "hopeless" just before trial, it is even more so during a remand proceeding that typically occurs more than a year later. In such proceedings, defendants and prosecutors have predictably disputed whether the prosecutor would be permitted to offer additional reasons on remand beyond those given at jury selection. This Court gave some guidance on that point in *Miller-El v. Dretke*, where it rejected a

reason given by the state that had not been given at jury selection, stating that it "reek[ed] of afterthought," 545 U.S. at 246, and that "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Id.* at 252. Nonetheless, courts have allowed prosecutors to supplement their race-neutral explanations on remand. In *United States v. Taylor*, for example, as noted above, the Seventh Circuit has remanded to the district court twice. On the second remand, the district court ordered that the government would be permitted "to state reasons beyond [the] record for challenging or not challenging jurors in question." Minute Order, *United States v. Taylor*, No. 01-CR-73, (N.D. Ind. July 8, 2008) (Docket Entry No. 1032).

3. *Batson* remand proceedings often turn out to be a waste of judicial resources, as litigants dispute the permissible parameters of the proceedings, and the proceedings often take on lives of their own. One example of this is, again, the Seventh Circuit's ongoing controversy in *United States v. Taylor*. In that case, the indictment issued in 2001, jury selection and the jury's guilty verdict occurred in 2004, and the case is now on its *third* appeal to the Seventh Circuit relating to *Batson* issues. As noted above, in 2007 the Seventh Circuit ordered a "limited remand" to the district court for further findings on the *Batson* challenge. 509 F.3d at 845-46. The district court issued a short statement to the effect that he remembered jury selection (which had occurred nearly 4 years prior) and, based on the prosecutor's demeanor and arguments, the prosecutor was credible. Statement, *United States v.*

*Taylor*, No. 01-CR-73, (N.D. Ind. Jan. 17, 2008) (Docket Entry No. 1026). The Seventh Circuit found the district court's findings still lacking and remanded again, ordering an evidentiary hearing at which the district court would "determine de novo whether the *Batson* challenge has merit." 277 Fed. App'x at 613.

On the second remand, the parties disputed what procedures would be followed. The district court allowed the prosecutor to give new race-neutral explanations for its peremptory challenges, but it did not allow the defendants to cross-examine the prosecutors under oath or to have access to the prosecutors' contemporaneous notes of jury selection. After the evidentiary hearing, which was held more than four years after jury selection, the district court issued a twenty-one page opinion sustaining the peremptory strike. *United States v. Taylor*, 604 F. Supp. 2d 1210 (N.D. Ind. 2009). The case is on appeal again, and among the defendants' arguments are challenges to the procedures used during the evidentiary hearing. Defendants-Appellants' Joint Brief, *United States v. Taylor*, No. 09-1291 (7th Cir.) (filed June 16, 2009). Had the Seventh Circuit simply ordered a new trial instead of a remand, it seems likely that fewer resources would have been wasted. Similarly, in the present case, the trial lasted one day, but the proceedings relating to the *Batson* challenge are ongoing.

So long as the law remains unclear regarding the consequences of a trial court's failure to make findings at the third step of the *Batson* procedure, these remands directed to reconstructing a procedure Justice Breyer described as "awkward"

and "hopeless" will continue to tie up the resources of the courts, with little or no countervailing benefit.

The Court should clarify *Snyder* and put an end to such remands. Where a trial court fails to make the findings required to support the denial of a defendant's *Batson* challenge, and where the prosecutor's race-neutral explanation cannot be confirmed or rejected on the basis of the record, a clear rule that a new trial is required will give trial courts a strong incentive to fulfill their "pivotal role" properly in the first instance.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 12, 2009

# APPENDIX

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**UNITED STATES of America,**
**Plaintiff-Appellee,**

**v.**

**Robert McMATH, Defendant-Appellant.**

**No. 08-2316.**

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 16, 2009.

Decided March 19, 2009.

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Gordon P. Giampietro, Attorney, Michelle L. Jacobs, Attorney, James L. Santelle, Attorney (argued), Office of the United States Attorney, Milwaukee, WI, for Plaintiff-Appellee.

Douglas G. Smith, Attorney (argued), Kirkland & Ellis, Chicago, IL, for Defendant-Appellant.

Before BAUER, FLAUM, and WOOD, Circuit Judges.

FLAUM, Circuit Judge.

Robert McMath was convicted in a one-day jury trial of possessing a firearm after being convicted of a felony in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court sentenced McMath to sixty-three months in prison, which included a two-level enhancement for perjury and obstruction of justice. McMath challenges both his conviction and

sentence on appeal. With regard to his conviction, McMath argues that the district court erred when it did not make factual findings pursuant to his *Batson* challenge and also that remarks made by the prosecutor during closing arguments denied him of a fair trial. With regard to his sentence, McMath challenges the district court's two-level enhancement of his sentence for obstruction of justice.

For the reasons explained below, we remand this case for further proceedings in light of this opinion. Upon remand, the district court should first determine whether it can make factual findings on the *Batson* issue. If it is unable to do so or finds that McMath's challenge was meritorious, it must vacate McMath's conviction. If the district court is able to make factual findings and holds that the *Batson* challenge should be denied, the district court should proceed to resentencing in light of our conclusion that the district court's obstruction of justice enhancement relied on a mistaken factual finding.

## I. Background

### A. Events of May 8, 2007

On the evening of May 8, 2007, Milwaukee police officers Chad Boyack and Cory Washington were on patrol when they observed a Pontiac Bonneville driving above the speed limit. The officers pursued the vehicle and activated their lights and siren. The officers observed the rear passenger (later identified as McMath, an African American male) sitting "between the middle and passenger side" of the vehicle. Both officers noticed McMath moving around in the back of the car. As the vehicles approached the corner of Keefe and Palmer streets, the Bonneville took a fast, hard right turn. As it

made the turn, the squad car's lights shone into the Bonneville and both officers observed McMath lift himself up, put both arms toward the back passenger window (which was about half-way open), and toss a gun out of the window.

The Bonneville pulled over about a half-block later and the officers arrested McMath. The officers noticed that the back passenger-side window was still about half-way down. The gun was later recovered from the west side of Palmer Street.

**B. Jury Selection**

The district court called thirty-six prospective jurors for the voir dire in McMath's case. No jurors were excused for cause. The government exercised one of its peremptory challenges to excuse Juror 7, one of two African–American jurors on the panel. When the clerk announced the jurors selected, McMath's counsel, Mr. Erickson, objected and the prosecutor, Ms. Blackwood, responded. The following excerpt from pre-trial proceedings captures the entire discussion regarding the challenge:

> MR. ERICKSON: I have an issue about Juror 7, the African–American.
>
> THE COURT: All right.
>
> MR. ERICKSON: So, I mean, if you want to—do you want me to do it now?
>
> THE COURT: What is the issue?
>
> MR. ERICKSON: Yeah, I was thinking under *Batson*, obviously he's African–American. He was struck. The only information we had about him is he was

retired. He worked at Social Services, janitorial. There's other jurors left on this jury that are retired. Under similar circumstances I think it would be incumbent upon the Government to raise a racially neutral factor at this point.

MS. BLACKWOOD: Your honor, there are two African–Americans that were on the panel; one was struck. There is no pattern of discrimination that's been demonstrated.

MR. ERICKSON: Your honor, even though one is left on, there still, I think, has to be a race neutral factor and there's not here.

MS. BLACKWOOD: Race neutral factor is expression on his face. That's all I can say. He looked angry and not happy to be here.

MR. ERICKSON: I think pretty much the whole jury looked like that.

MS. BLACKWOOD: I disagree. I didn't see that expression.

MR ERICKSON: There were several people that had the same expression.

THE COURT: The *Batson* challenge is denied.

The district court did not discuss the matter further and Juror 7 was excused.

## C. The Trial and Closing Statements

At trial, the government's case relied almost exclusively on the testimony of Officers Boyack and Washington, who testified to the facts outlined above. McMath took the stand in his defense and testified that he had been drinking that night and that he had dozed off during the car ride with his head against the back driver's-side window. He stated that he awoke when the car took the hard right turn and he "kind of leaned" to the right side. He said that he ended up on the right/passenger side of the car because he was "kind of—wobbly, so I went over that way." He denied throwing a gun out of the rear window and stated that he did not see anyone throw a gun out of the car. On cross, McMath acknowledged that he knew that he would go to prison if he was caught with a gun. He also admitted that he asked an officer during an interview later that night, "If I can prove that the gun isn't mine, I can beat this, right?"

The prosecution's closing statement and rebuttal statement contained two types of remarks now challenged on appeal.[1] First, the prosecutor commented on the credibility of the testifying police officers as well as McMath. In her closing statement, the prosecutor stated that the jury should

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[1] For context, McMath's attorney argued in closing that the police conducted a sloppy investigation. He stated that the police likely did not see who threw the gun out the window but attributed it to McMath after he handed them a Wisconsin Department of Corrections identification card. Defense counsel also pointed out that there was no physical evidence, such as DNA or fingerprints, linking McMath to the gun. Finally, McMath's counsel argued that there was reasonable doubt.

believe the officers because "[t]hey're not out to get Robert McMath. They're out to get guns off the street and out of the hands of felons, and they saw what they saw." In her rebuttal, the prosecutor also told the jury that the officers would lose their jobs if they lied:

> [I]f you want to buy that they came in and perjured themselves to get Robert McMath who they don't know from Adam just to get somebody, that would be immoral; that would be unethical, that would be a million things; that would be the loss of their job. I mean, you know, is that reasonable . . . ?

The prosecutor stated that she "knew" McMath did not want to admit his guilt to the jury and that his story was "completely bogus" based on "physics and centrifugal force" in the car.

Second, the prosecutor made statements regarding the lack of DNA evidence in the case. During her rebuttal, the prosecutor stated:

> Now, again, you know, this whole specter of fingerprints and DNA evidence and equating that with reasonable doubt; once again, I'm afraid that Hollywood has done a service—disservice to law enforcement because Hollywood makes you believe that you're always going to be expecting to find DNA and fingerprint evidence.

She also implied that one reason the government did this forensic testing was to prevent defense counsel from pointing out the lack of such testing:

> Well, I guess we're damned if we do, and we're damned if we don't. Why did they even check for DNA and fingerprint evidence if it doesn't matter. That's what he [defense counsel] says. And yet if we hadn't checked for it he'd be stomping and pounding the podium and yelling about why didn't they check for prints, why didn't they check for DNA; so police do it as a matter of course. Sometimes you're lucky; sometimes you're not.

After closing statements the jury retired to deliberate and returned a guilty verdict on the one-count indictment.

**D. Sentencing**

The district court sentenced McMath to sixty-three months in prison, which included a two-level increase in his offense level for obstruction of justice pursuant to U.S.S.G. § 3C1.1.

In explaining its decision on the obstruction enhancement, the district court recounted portions of McMath's testimony. The court said that "Mr. McMath's statement regarding his activities in the car, his location in the car, his denial that he had a gun or saw a gun in my view were untrue, perjury, an attempt to obstruct the proceeding and a factual basis for this court to assess the two points under the sentencing guidelines." Significantly, the district court also discussed a photograph of the Pontiac Bonneville that showed that the window on the rear passenger side was open. The district court asserted that McMath had testified that the window was up, and stated that "[t]hat [discrepancy] alone is enough

to justify the obstruction points. That alone." At sentencing McMath, the district court told McMath:

> [Y]ou did not tell the truth when you took the stand in this case. And if your perjury were not as clear the court might be more inclined to cut you a break. That's one reason why I even asked you if you wished to make a statement. That's one reason why I gave you an opportunity to reflect on what you testified to during the trial. That is one reason why I offered up the photograph [of the car], so that you could observe that when you testified about the window in the back seat of the car being up, the objective proof shows it was not. But you still did not accept responsibility.

However, contrary to the district court's assertion, the trial transcript shows that McMath did not testify that the rear window on the passenger side was closed; rather he testified that the rear window on the *driver's* side was closed.

## II. Discussion

### A. *Batson* Challenge

In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) the Supreme Court held that a state's exercise of peremptory challenges to exclude jurors on account of race violated the defendant's equal protection rights. *Batson* challenges require a three-step inquiry: (1) the defendant must establish a prima facie case that a peremptory challenge was used to exclude a juror on the basis of race; (2) once the defendant establishes

the prima facie case, the prosecutor must provide a race-neutral explanation for the exclusion; and (3) the court must determine whether the objecting party has carried his burden to prove discrimination. *United States v. Cooper*, 19 F.3d 1154, 1158 (7th Cir. 1994).

McMath alleges that the district court improperly failed to make factual findings when ruling on his *Batson* challenge. Traditionally, we review the district court's *Batson* findings for clear error. *See Rice v. Collins*, 546 U.S. 333, 338, 126 S. Ct. 969, 163 L.Ed.2d 824 (2006) ("On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error."); *accord United States v. Evans*, 192 F.3d 698, 700 (7th Cir. 1999). However, because McMath alleges that the district court failed to appropriately conduct the *Batson* inquiry, a legal error, our review is de novo.[2]

As recounted above, the district court denied McMath's *Batson* challenge without comment on the

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[2] In *United States v. Taylor*, 509 F.3d 839, 843–44 (7th Cir. 2007), we declined the defendants' invitation to apply de novo review to what the defendant characterized as the district court's misapprehension of the *Batson* procedure. However, in that case, unlike here, the court found the defendant's claims of legal error to be overstated. Here, that is not the case, and de novo review of the district court's *Batson* inquiry appears to be appropriate. In any event, however, a mistake of law generally satisfies clear error, de novo or for that matter abuse of discretion review. *See Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003) ("[A] district court by definition abuses its discretion when it makes an error of law, and, while factual findings are generally reviewed only for clear error, findings which are tainted by the application of an inapposite standard are subject to fuller review") (internal citations omitted).

matter. McMath argues that by not making factual findings on the credibility of the government's proffered race-neural reason for the strike, the district court acted contrary to the Supreme Court's recent decision in *Snyder v. Louisiana*, —— U.S. ——, 128 S. Ct. 1203, 1207–08, 170 L.Ed.2d 175 (2008). The government asserts that McMath failed to make a prima facie case of discrimination, as required by *Batson*, and also that the judge's ultimate denial of the *Batson* challenge should be understood as "implicit findings" on whether the prosecutor's race-neutral reason was credible.

We first look to the government's argument that McMath never satisfied the first prong of the *Batson* inquiry of making a prima facie case of discrimination. As an initial matter, this argument appears to be moot under *Hernandez v. New York*, 500 U.S. 352, 356–58, 111 S. Ct. 1859, 114 L.Ed.2d 395 (1991) because, despite the government's contention now that the defendant did not present a prima facie case, at the time of the challenge, the prosecution provided a race-neutral reason and the district court ruled on the *Batson* challenge. In *Hernandez*, the Supreme Court considered essentially the same scenario. In that case, the defendant raised a *Batson* objection, and, as in this case, the prosecutor did not wait for a ruling on whether the defendant had established a prima facie question of racial discrimination. Rather, the prosecutor volunteered his reasons for striking the jurors in question and the trial court denied the defendant's challenge to the exclusion. *Id.* at 356–58, 111 S. Ct. 1859. The Supreme Court ruled that in this situation—where "a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the

ultimate question of intentional discrimination"—the issue of whether the defendant has made a prima facie case "becomes moot." *Id.* at 359, 111 S.Ct. 1859. It thus appears that the question of whether McMath made a prima facie case is moot.

However, even if this question was not moot, it appears that the defendant satisfied the requirements of the prima facie case. In *Johnson v. California*, 545 U.S. 162, 173, 125 S. Ct. 2410, 162 L.Ed.2d 129 (2005), the Supreme Court reaffirmed the principle that, in making a prima facie case, a defendant need only produce evidence sufficient to permit an inference of discrimination in order to satisfy the first step of the *Batson* analysis. The test is not rigorous: suspicion even less than "more likely than not" suffices. *See id.; accord United States v. Stephens*, 421 F.3d 503, 512 (7th Cir. 2005) ("[T]he burden at the prima facie stage is low, requiring only circumstances raising a suspicion that discrimination occurred, even when those circumstances are insufficient to indicate that it is more likely than not that the challenges were used to discriminate.").

Here, the defendant met this threshold. The defendant noted that the prosecution had used its peremptory challenge to remove Juror 7, one of two African–American jurors, and also noted that "[t]he only information we had about him is he was retired. He worked at Social Services, janitorial. There's other jurors left on this jury that are retired [who were not struck]." Although this evidence is certainly not conclusive, it suffices for the prima facie case. While it is true that it would not have been sufficient for defense counsel merely to point to the stricken juror's race, *see, e.g., Anderson v.*

*Cowan*, 227 F.3d 893, 901–02 (7th Cir. 2000), defense counsel's statement that jurors sharing Juror 7's only other known characteristic, his status as a retiree, had been retained by the prosecution pointed out a relevant circumstance that was sufficient to permit an inference of discrimination and prompt the prosecution to provide a race neutral justification for the exclusion. *See United States v. Taylor*, 509 F.3d 839, 844 (7th Cir. 2007) (proper to compare stricken black jurors to unstricken white jurors in the context of a *Batson* challenge) (citing *Miller–El v. Dretke*, 545 U.S. 231, 241, 125 S. Ct. 2317. 162 L.Ed.2d 196 (2005)).

We turn now to the second step of the *Batson* inquiry in this case. The government claimed that it struck Juror 7 because of the expression on his face; specifically, the government stated that he "looked angry and not happy to be here." It is well-established that a juror's demeanor is a valid race-neutral basis for a peremptory strike, which is all that is required for step two of the *Batson* inquiry. *See, e.g., United States v. Hinton*, 94 F.3d 396, 397–98 (7th Cir. 1996) (listing a number of demeanor-based reasons which may properly be the basis of choosing jurors); *see also United States v. Briscoe*, 896 F.2d 1476, 1489 (7th Cir. 1990) (accepting that "intuitive assumptions that are not fairly quantifiable" play a role in jury selection). Thus, the prosecutor's reason, if credible, was a proper reason for striking Juror 7 in this case.

We thus come to the third step of the *Batson* inquiry: the district court's determination regarding discrimination. Specifically, we must decide whether the district court's summary ruling on the *Batson* issue was legally sufficient to dispose of

McMath's *Batson* challenge. The Supreme Court's recent decision in *Snyder v. Louisiana*, —— U.S. —— –, 128 S. Ct. 1203, 1207–08, 170 L.Ed.2d 175 (2008) is highly relevant to our analysis. In *Snyder*, the defendant made a *Batson* challenge and the prosecutor explained that he had requested the strike first because the juror in question looked "nervous," and second because the prosecutor worried that the juror might attempt to deliver a guilty verdict to a lesser charge in order to keep deliberations short and get back to his job more quickly. The trial court did not make any findings regarding the challenge, saying only: "All right. I'm going to allow the challenge. I'm going to allow the challenge." *Id.* at 1208.

The Supreme Court first emphasized that the trial court has a "pivotal role" in evaluating *Batson* claims. *Id.* at 1208. The Court noted that especially where "race-neutral reasons for peremptory challenges [ ] invoke a juror's demeanor (e.g., nervousness, inattention)," the trial court's first-hand observations are "of even greater importance." *Id.* The Court stated that when a prosecutor invokes a juror's demeanor as the race-neutral reason for the strike, "the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Id.*

In reviewing the case, the Supreme Court observed that "nervousness" could not be shown from a cold transcript, which, it noted again, showed why the trial judge's evaluation must be given deference. *Id.* at 1209. However, the trial judge in

*Snyder* had not made findings concerning the juror's demeanor and instead simply allowed the peremptory strike without explanation. As the Court observed, it was difficult to tell why the trial court denied the challenge. *Id.* The trial judge may not have recalled the juror's demeanor at the time it made its ultimate ruling (a day after the challenge), or the judge may have credited the prosecutor's second basis for the strike (that the juror was likely to deliver a verdict to a lesser charge in order to keep deliberations short). Because there was no way to tell why the judge ruled as it did, the Court could not "presume that the trial judge credited the prosecutor's assertion that [the juror] was nervous." *Id.* at 1209.

In light of the "absence of anything in the record showing that the trial judge credited the claim that [the juror] was nervous"—and because the prosecutor's second basis for the strike appeared to be pretextual, *see id.* at 1209–12—the record did not show that the prosecution would have pre-emptively challenged the juror based on his nervousness alone. *Id.* at 1212. Since there was no "realistic possibility that this subtle question of causation [for the peremptory challenge] could be profitably explored further on remand" more than a decade after the defendant's trial, the Court's ruling had the effect of setting aside the defendant's conviction and sentence. *See State v. Snyder*, 982 So.2d 763 (La. 2008) (observing that the Supreme Court's decision "effectively sets aside defendant's conviction and sentence").

Here, like *Snyder*, the district court made no findings regarding the prosecutor's race-neutral demeanor-based justification of the strike. Rather,

the judge simply stated that the *Batson* challenge was denied. The district court did not indicate whether it agreed that Juror 7 had an unhappy expression on his face, did not indicate whether this expression was unique to Juror 7 or common to other jurors, and made no evaluation of the prosecutor's credibility. Like *Snyder*, the record here does not show that the prosecutor based the strike on Juror 7's expression alone and, as Snyder teaches, we cannot presume that the prosecutor's race-neutral justification was credible simply because the district judge ultimately denied the challenge.

The government urges us to find that the district court's summary denial was an "implicit finding" that the prosecutor's explanation was credible. However, the notion that a district judge's summary denial of a *Batson* challenge can be interpreted as "implicit findings" on the proffered race-neutral justification for the strike clearly undermines *Snyder*. *Id.* at 1209. *Snyder* makes clear that a summary denial does not allow us to assume that the prosecution's reason was credible; rather, the district court's silence leaves a void in the record that does not allow us to affirm the denial. We thus conclude that the district court clearly erred in denying the *Batson* challenge without making findings regarding the credibility of the proffered race-neutral justification for the strike.

We believe that remanding for further findings and a possible evidentiary hearing on the *Batson* issue is the most appropriate step at this time. *See, e.g.*, *Taylor*, 509 F.3d at 845–46 (retaining jurisdiction but remanding for the district court to supplement the record with factual findings); *United States v. Taylor*, 277 Fed. Appx. 610, 612–13 (7th

Cir. 2008) ("*Taylor II*") (concluding that the district court made insufficient factual findings after *Taylor I* and remanding again for an evidentiary hearing to develop the record). In *Snyder*, remand for the trial judge to make findings regarding the juror's demeanor was deemed fruitless because the trial had occurred more than ten years prior. *Id.* at 1212 ("[T]here is no realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after petitioner's trial."). But remand may be more worthwhile in this case, as voir dire occurred only a little over a year ago. While it is certainly possible that the passage of time will make it impossible for the district judge to make findings of fact, our concern for judicial economy persuades us that allowing the district judge the opportunity for such findings is the correct course. Upon remand, if the passage of time precludes the district court from making factual findings, it must vacate the judgment of conviction. In the event the district court can arrive at appropriate findings of fact satisfying the *Batson* inquiry, it should proceed to resentencing in accord with this opinion, as explained in Part C of our analysis.

**B. Prosecutorial Misconduct**

The defendant claims that several comments made by the prosecutor in her closing argument and rebuttal argument denied him a fair trial. Because McMath did not object to the remarks during trial, we review for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 731–36, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993). Reversal is only warranted where there is "(1) error, (2) that is plain, and (3) that affect[s] substantial rights" and "(4) the error seriously affect[s] the fairness, integrity, or

public reputation of judicial proceedings." *See Johnson v. United States*, 520 U.S. 461, 466–67, 117 S. Ct. 1544, 137 L.Ed.2d 718 (1997) (internal quotations omitted).

This Court employs a two-part test to assess allegations of prosecutorial misconduct in closing arguments. First, the court will "consider the prosecutor's disputed remarks in isolation to determine whether they are improper." *United States v. Johnson–Dix*, 54 F.3d 1295, 1304 (7th Cir.1995). If the remarks are improper in isolation, we "consider the remarks in the context of the entire record and assess whether they ad [*sic*] the effect of denying the defendant a fair trial." *Id.* In analyzing the statements, the court should consider

> the nature and seriousness of the statement; whether the statement was invited by the conduct of defense counsel; whether the district court sufficiently instructed the jury to disregard such statements; whether the defense could counter the improper statement through rebuttal; and finally, whether the weight of the evidence was against the defendant.

*United States v. Severson*, 3 F.3d 1005, 1014 (7th Cir. 1993); *accord Johnson–Dix*, 54 F.3d at 1304 (quoting Severson, 3 F.3d at 1014). As a general matter, improper comments during closing arguments "rarely rise to the level of reversible error, and considerable discretion is entrusted to the district court to supervise the arguments of counsel." *United States v. Wilson*, 985 F.2d 348, 353 (7th Cir. 1993) (quotation marks and citation omitted).

**1. Comments Regarding Witness Credibility**

We first consider the prosecutor's remarks about the police officers' testimony. The prosecutor stated that the jury should believe the police officer witnesses because "[t]hey're not out to get Robert McMath. They're out to get guns off the street and out of the hands of felons, and they saw what they saw." In her rebuttal, the prosecutor also told the jury that the testimony of the officers was "clear and really credible" and further commented that the officers would lose their jobs if they lied. The first comment—that the officers' goal was to get guns of the street—did not likely have a negative effect on the jury. The jury heard evidence that McMath was arrested by the officers for being a felon in possession of a weapon, and thus likely intuited that combating such conduct was part of the officers' job. *See United States v. Amerson*, 185 F.3d 676, 686 (7th Cir. 1999) (prosecutor's statement that it was officers' job to arrest dope peddlers was not improper vouching). The prosecutor's comment regarding the officers being "really credible," while technically improper vouching, also seems fairly innocuous in context. Credibility was a central issue in the case and while the prosecutor should not have commented directly on the officers' credibility, we cannot conclude that McMath's substantial rights were affected by the remark.

However, it was improper for the prosecutor to say that the officers would lose their jobs if they lied, as the government has conceded. *See Johnson–Dix*, 54 F.3d at 1304–05 (improper for prosecutor to assert that law enforcement agent would risk his job if he lied); *United States v. Swiatek*, 819 F.2d 721, 731 (7th Cir.) (improper for prosecutor to argue that agent had no reason to lie and to risk his career and

reputation), *cert. denied*, 484 U.S. 903, 108 S.Ct. 245, 98 L.Ed.2d 203 (1987). Thus, we must consider whether the statement—in the context of the entire record—deprived McMath of a fair trial.

We first note that McMath's counsel had no opportunity to counter the statement, as it was made in the government's rebuttal argument. However, the rest of the relevant factors counsel against a finding that McMath's substantial rights were violated by this comment. The prosecutor did not misstate any evidence in her remark. Although the district court did not immediately instruct the jury to disregard the comment, it later instructed the jury that closing arguments were not evidence. Most importantly, the record reflects that the officers' credibility was solidly established apart from the prosecutor's improper remark. The defendant's cross-examinations of the officers revealed no significant inconsistencies in their testimony or biases which may have motivated them to lie. Thus, although the remark was improper, we do not believe that it jeopardized the fairness or integrity of McMath's trial. *See Johnson*, 520 U.S. at 466–67, 117 S. Ct. 1544.

The prosecutor also made remarks about McMath's credibility. She stated that McMath's story was "completely bogus" based on "physics and centrifugal force" in the car and that she "knew" McMath did not want to admit his guilt to the jury. These comments did not constitute plain error. First, the prosecutor was in some sense correct that McMath's testimony was belied by physics. McMath testified that when the Bonneville took a hard right turn he leaned to the right. But when a car turns right, passengers are thrown to the left. Second,

while the prosecutor probably should not have said that she "knew" McMath did not want to admit his guilt, challenging McMath's veracity and stating that his version was "bogus" does not meet the standard for plain error. We have held that a prosecutor is permitted to draw reasonable inferences from the evidence in discussing witness credibility, and may go so far as to call the defendant a liar if the record supports that accusation. *See United States v. Andreas*, 216 F.3d 645, 671 (7th Cir. 2000). Here, there was reason to question McMath's account. In any case, these statements did not affect the fairness of the trial and thus do not constitute plain error.

**2. Comments Regarding Physical Evidence**

McMath challenges the prosecutor's statements made in rebuttal regarding the lack of DNA evidence. In McMath's closing argument, his lawyer stated, regarding DNA evidence:

> You know, if that wasn't really important, why the heck did [the police] [have the gun checked for prints and DNA]? I mean, no matter what spin is put on it, [McMath's] fingerprints are not on that gun, his DNA are [sic] not on that gun.

During her rebuttal, the prosecutor stated:

> Now, again, you know, this whole specter of fingerprints and DNA evidence and equating that with reasonable doubt; once again, I'm afraid that Hollywood has done a service—disservice to law enforcement because Hollywood makes you believe that

> you're always going to be expecting to find DNA and fingerprint evidence.

The prosecutor also indicated that one reason the government conducted DNA and fingerprint testing was to prevent defense counsel from pointing out the lack of such testing. Specifically, she stated:

> Well, I guess we're damned if we do, and we're damned if we don't. Why did they even check for DNA and fingerprint evidence if it doesn't matter. That's what he [defense counsel] says. And yet if we hadn't checked for it he'd be stomping and pounding the podium and yelling about why didn't they check for prints, why didn't they check for DNA; so police do it as a matter of course. Sometimes you're lucky; sometimes you're not.

McMath argues that these statements were not based on the evidence and violated a district court ruling which barred Officer Boyack from testifying to similar matters.

We do not find these comments to be clear error. While the district court had earlier ruled that Officer Boyack could not testify about the frequency with which DNA or fingerprint evidence was obtained, it is worth noting that neither the defendant nor the court made any contemporaneous objection to the prosecutor's comments. This is not entirely surprising: it does not appear that the prosecutor was trying to introduce expert-type testimony about the frequency with which DNA or fingerprint evidence is obtained, as defendant contends. Rather, the prosecutor was stating—perhaps inartfully—

that such results cannot always be expected and that the absence of such evidence should not be held against the government. As the government states, the comment "was not a reference to 'facts' outside the record, but instead was an argument about how the jury ought to weigh the absence of scientific evidence." In any case, even if the comments shaded into impermissible commentary, the comments did not render the petitioner's trial unfair.

**C. Sentencing**

McMath contends that the district court based its obstruction of justice sentencing enhancement on a mistaken belief regarding McMath's testimony. We review de novo the adequacy of the district court's obstruction of justice findings and any underlying factual findings for clear error. *United States v. Carroll*, 412 F.3d 787, 793 (7th Cir. 2005).

In reaching its decision on the enhancement, the district stated that "Mr. McMath's statement regarding his activities in the car, his location in the car, his denial that he had a gun or saw a gun in my view were untrue, perjury, an attempt to obstruct the proceeding and a factual basis for this court to assess the two points under the sentencing guidelines." The court also relied in part on a photograph of the Bonneville that showed that the window on the rear passenger side was open. The district court asserted that McMath had testified that the window was closed, and stated that "[t]hat alone is enough to justify the obstruction points. That alone."

In sentencing McMath, the district court told him:

> [Y]ou did not tell the truth when you took the stand in this case. And if your perjury were not as clear the court might be more inclined to cut you a break. That's one reason why I even asked you if you wished to make a statement. That's one reason why I gave you an opportunity to reflect on what you testified to during the trial. That is one reason why I offered up the photograph [of the car], so that you could observe that when you testified about the window in the back seat of the car being up, the objective proof shows it was not. But you still did not accept responsibility.

However, the trial transcript shows that McMath did not testify that the rear window on the passenger side was closed; rather he testified that the rear window on the *driver's* side was closed.

> Q. And your window was halfway open, correct?
>
> A. No, my window was up.
>
> Q. Your window was up?
>
> A. Yeah, my arm—the window behind the driver was up. The window I was laying on—
>
> Q. But the other window was halfway open, correct?

> A. I mean, I really don't even know; but I seen from the pictures that it was, so yes.

It thus appears that the district court was mistaken when it found that McMath had testified falsely that the passenger-side window was closed.

We must defer to the district court's findings of fact unless they are clearly erroneous, and we arrive at a "definite and firm conviction that a mistake has been made." *United States v. Brierton,* 165 F.3d 1133, 1137 (7th Cir. 1999). Although the district court based its perjury finding on several areas of McMath's testimony other than testimony regarding the passenger-side window, the district court focused on the window issue quite a lot when pronouncing McMath's sentence. The district court even stated that "if your perjury were not as clear the court might be more inclined to cut you a break . . . That is one reason why I offered up the photograph [of the car], so that you could observe that when you testified about the window in the back seat of the car being up, the objective proof shows it was not."

Where a district court selects a guidelines range by relying on a clearly erroneous factual finding, "we are obliged to remand for resentencing unless, reviewing the record as a whole, we can conclude that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed." *United States v. Hollis,* 230 F.3d 955, 958 (7th Cir. 2000) (citing *Williams v. United States,* 503 U.S. 193, 201–04, 112 S. Ct. 1112, 117 L.Ed.2d 341 (1992)). Here, we cannot conclude that the error did not affect the district court's sentence and thus we

vacate and remand for possible resentencing.[3] *See, e.g., United States v. Berheide,* 421 F.3d 538, 539 (7th Cir. 2005) (vacating and remanding sentence because district court relied on erroneous factual finding regarding loss amount).

## III. Conclusion

For the reasons explained above, we REMAND this case for further proceedings in light of this opinion. Upon remand, the district court should first determine whether it can make factual findings on the *Batson* issue. If it is unable to do so or finds that McMath's challenge was meritorious, it should vacate McMath's conviction. If the district court is able to make factual findings and holds that the *Batson* challenge should be denied, the district court should proceed to resentencing in light of our conclusion that the district court's obstruction of justice enhancement relied on a mistaken factual finding.

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[3] Of course, resentencing will only be necessary if the district court is able to make factual findings on the *Batson* issue and concludes that the *Batson* challenge should be denied, as explained above.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,
Plaintiff,

–vs– CASE NO.: 07-CR-154

ROBERT McMATH,
Defendant.

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**Volume 1**

Excerpt of trial proceedings in the above-entitled matter, held before the Honorable Charles N. Clevert, Jr., on the 26th day of November, 2007, commencing at 8:53 a.m. and concluding at 5:47 p.m.

APPEARANCES:

United States Department of Justice
Office of the U.S. Attorney
Ms. Elizabeth M. Blackwood
517 East Wisconsin Avenue, Room 530
Milwaukee, Wisconsin 53202
Appeared on behalf of the Plaintiff

Thomas J. Erickson Law Office
Mr. Thomas J. Erickson
611 North Broadway
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Appeared on behalf of the Defendant, also present.

Ms. Kristine Wilson Brah, Courtroom Deputy.

Ms. Sheryl L. Stawski, RPR, Official Reporter.

TRANSCRIPT OF PROCEEDINGS

THE CLERK: Case number 2007-CR-154, United States of America v. Robert McMath. This matter is before the Court for a jury trial. May we have the appearances, please?.

MS. BLACKWOOD: Good morning, Your Honor, Elizabeth Blackwood, Assistant United States Attorney appears on behalf of the United States.

THE COURT: Good morning.

MR. ERICKSON: Tom Erickson. I'm here for Robert McMath. Good morning, Your Honor.

THE COURT: Good morning, Mr. Erickson. Good morning, Mr. McMath.

THE DEFENDANT: Good morning.

[*material omitted*]

THE COURT: [* * *] Very well. We have 54 jurors upstairs. What we're going to do is draw thirty -- I think we said 32. No.

MS. BLACKWOOD: I think it's 31; 18 plus 13.

THE COURT: We'll bring down about 35. Let's bring down about 35 or 36. They should be here momentarily. Is there anything else? The Court is

going to require that all witnesses be sequestered, and that both sides instruct their witnesses that they're not to discuss their testimony with anyone else in the case. That would continue throughout the trial.

An admonition will be given to the jury -- I'm sorry -- to each of these witnesses at the time they leave the courtroom; but prior to the commencement of the trial witnesses are instructed that they cannot talk with one another concerning their testimony; so if you will take a couple of moments to instruct your witnesses, I would appreciate it. If there is a need for them to be directed to another room, this is the opportunity to do that. All right.

(Recess was taken at 9:05 a.m. until 9:28 a.m.)

THE COURT: Be seated, please. Good morning everyone. I'm Judge Charles Clevert. The cause set for trial today is the matter of the United States of America, plaintiff, versus Robert C. McMath.

This case involves an indictment which charges as follows: That on or about May 8th, 2007, in Milwaukee County, in the State and Eastern District of Wisconsin, Robert C. McMath, who previously had been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed a firearm, which prior to his possession of it, had been transported in interstate and foreign commerce, the possession of which was therefore in and affecting commerce. The firearm is more fully described as a CZ, model 70, 7.65 millimeter pistol, bearing serial number 696843, all in violation of Title 18, United States Code, Sections

922 (G) (1) and 924 (A) (2). This case is scheduled to be tried over the course of the next day or two. We expect to be finished if not today certainly no later than Wednesday.

At this point, we are going to go through what is called the voir dire process during which you will be sworn in and asked a series of questions to determine your suitability to serve as jurors in this case. This process is not designed to be intrusive. Instead, it's designed to give us an opportunity to learn a little more about you and whether or not you are suitable jurors to serve in this case. It is important that unbiased witnesses and unbiased jurors and unbiased parties serve in these cases. At this point in time I would ask the clerk to swear in the panel.

(The jury panel was first duly sworn. )

THE COURT: I do ask that the parties introduce themselves. We'll start with first table.

MS. BLACKWOOD: Thank you. Ladies and gentlemen, my name is Elizabeth Blackwood. I'm the Assistant United States Attorney in the Eastern District of Wisconsin. Thank you.

MR. ERICKSON: Good morning. My name is Tom Erickson. I'm the attorney for Robert McMath. Robert McMath is here. Good morning.

THE COURT: I'd like to begin by asking whether anyone here knows the attorneys or Mr. McMath. (No response.) Now, I mentioned that this case is scheduled to last for several days. Is there anyone

who has any pressing personal business that would make it difficult for you to give this case your undivided attention if you are selected as jurors? All right, Number 22.

POTENTIAL JUROR: I have some surgery scheduled for this week Wednesday.

THE COURT: For Wednesday?

POTENTIAL JUROR: Yes.

THE COURT: All right. Your name is?

POTENTIAL JUROR: Gary Gertz.

THE COURT: Okay. Is there anyone else? Yes.

POTENTIAL JUROR (13): I have a test Thursday morning scheduled at the hospital if it would run that long.

THE COURT: We don't expect it will last that long. If it goes into Thursday, believe me, we'll have to reschedule the case and continue it on another day. Is there anyone else? (No response.)

Is there anyone who has any physical limitations that would make it difficult for you to sit for an hour and a half to two hours at a time? (No response.) We do take breaks, and one of the things I do ask people to do is stretch between witnesses. You can get some water. We do have -- looks like we have a nearly full water cooler in the back. It will be filled at the end of the day. But if there's anyone who has any difficulty in sitting or who needs a break

periodically, I do let people take breaks; and we will try to accommodate any personal needs such as that.

Now, the jury selection process, as I said, has the purpose of giving us some insights into your backgrounds. Hopefully you can see screens -- Is the screen on? At this point in time what we will do is start with Juror Number One and go through the panel and get some more information concerning you, and that will help us to better determine your suitability to serve as jurors in this case.

Please be candid. We need information from you that will help us to have some insight into who you are and what your sensibilities are and your ability to serve as jurors in this case. So we'll start with Juror Number One. Would you please stand?

POTENTIAL JUROR: My name is Ken Edwardsen. I'm 57. I live in the Town of Vernon. I'm married. Have an associate's degree in electronics. I'm a retired auto worker. My wife works in retail. I served on a civil trial in Milwaukee and reached a guilty verdict.

THE COURT: Okay. Thank you.

POTENTIAL JUROR: I'm Rick Haagensen. I'm 59 years old. Live in the city of Brookfield. I'm married. I have a college degree. I'm an account executive. My wife is not employed outside the home. And I've not served on a jury before.

THE COURT: Thank you.

POTENTIAL JUROR: My name is a Barbara Draeger. I'm 49 years old. I live in Muskego. I am

married. I have a master's degree, and I'm a reference librarian. And my husband is a salesman. And I have no prior jury service.

THE COURT: All right.

POTENTIAL JUROR: My name is Kay Fielder, and I'm 38. I live in Brookfield. Married. I have an associate's degree as well as my nursing certification. I'm a private nurse for a woman with ALS. And my husband is a manager of an IT company. And I have not been on a jury before.

THE COURT: Thank you.

POTENTIAL JUROR: My name is Edward Jones. I'm 59 years old. I live in Walworth, Wisconsin. Married. High school education. I'm a dairy worker. My wife is a branch manager for a bank.

THE COURT: All right.

POTENTIAL JUROR: My name is Michael Dec. I'm 49 years old. I live in Cudahy, Wisconsin. I'm currently married. I have a bachelor's degree from UWM in criminal justice. I work at -- for the State of Wisconsin as a probation and parole agent. I've been called once for jury duty and never actually served.

THE COURT: Okay. Thank you.

POTENTIAL JUROR: My name is Willie Morris, age 71. Resident of Milwaukee. Occupation, retired. I'm married. Been quite a while, about 8 years since I served jury duty -- 18 years ago.

THE COURT: Were you the foreperson of the jury?

POTENTIAL JUROR: Yeah.

THE COURT: Okay. And did the jury reach a verdict? Did the jury reach a verdict?

POTENTIAL JUROR: Yeah, they did.

THE COURT: Okay. Very well. Thank you.

POTENTIAL JUROR: Ken MacKenzie, 52. I live in Oconomowoc. Married. High school education. I'm a warehouse worker. My wife teaches little ones at the YMCA. And no prior service.

THE COURT: Okay.

POTENTIAL JUROR: My name is Barbara Ermer. I'm 62. I live in Mukwonago. I'm married. I have a high school education. I'm retired from an envelope factory, and my husband also.

THE COURT: Thank you.

POTENTIAL JUROR: I'm David McClelland. I'm 68 years old. Live in Racine, Wisconsin. Married. I have a degree in chemical engineering. I'm retired. And I have had no prior jury service.

THE COURT: Okay. Thank you.

POTENTIAL JUROR: My name is Paul Czarnecki. I'm 49 years old. I live in West Allis. Divorced. One year of college. And I work for the post office. And no prior jury service.

THE COURT: Thank you.

POTENTIAL JUROR: Beverly Hubing. Thirty. I live in Belgium. And I'm single. I have a college education. Customer service representative. And no prior jury service.

THE COURT: Thank you.

POTENTIAL JUROR: I'm Dorelle Bailey. I'm 58. I live in Pewaukee. I'm married. I have a high school education. I'm a switchboard operator. My husband is retired. And I've had civil jury duty twice, and we reached a verdict.

THE COURT: What did your husband do prior to retirement?

POTENTIAL JUROR: He was an instructor at WCTC.

THE COURT: Okay.

POTENTIAL JUROR: My name is Ann Britzke. I'm 52. I live in Racine. I'm in a committed relationship. I'm a registered nurse in Racine. My partner is a classification specialist for the Department of Corrections. I've been on Racine County jury duty twice, served once, reached a verdict. I was the foreperson.

THE COURT: Thank you.

POTENTIAL JUROR: My name is Joshua Lapp. I'm 21 years old. Live in Waukesha. I'm single. I'm going to school to be an electrician. And I've never served on a jury before.

THE COURT: Thank you.

POTENTIAL JUROR: My name is Damon Gross. I'm 29. I live in Sussex. I'm married. I have a bachelor's of science. I work as an IT person. My wife works in finance. And I've never been on jury duty before.

THE COURT: Thank you very much.

POTENTIAL JUROR: Good morning, my name is Bob Meyers. I'm 51. I live in Mequon, Wisconsin. I'm married. I have a bachelor of science in architectural engineering. I'm the director of sales and marketing for our company. My wife is a dental hygienist. And I have no previous service.

THE COURT: All right.

POTENTIAL JUROR: I'm Ed Bettinger. I'm 65. I live in Waukesha. I'm married. Associate's degree. Executive chef. My wife works at Waukesha Hospital Systems. I was in a civil case, and I was not the foreperson.

THE COURT: Thank you .

POTENTIAL JUROR: Hans Borosch. I'm 21. I live in Sussex. I'm not married. High school education. I 'm a landscaper, and I haven't served before.

THE COURT: What did you say at the end?

POTENTIAL JUROR: I have no service.

THE COURT: Okay. Thank you.

POTENTIAL JUROR: I'm Bryon Beatka, 27. City of Waukesha. Single. Glass fabricator. High school education. No prior service.

THE COURT: Thank you.

POTENTIAL JUROR: My name is Ray Crawford. I'm 64 years old. I live in sunny Greenfield. I'm married. I have a master's degree. I work for the postal service. No prior jury service.

THE COURT: Is it sunny in Greenfield today?

POTENTIAL JUROR: Not really.

THE COURT: I was just hoping.

POTENTIAL JUROR: My name is Gary Gertz. I'm 58. I also live in sunny -- sunny Greenfield. I'm divorced. I have a year of college. I'm a retired postal worker. I have been on jury service, a criminal case, and I did reach a verdict; and I was not the foreperson.

THE COURT: Thank you.

POTENTIAL JUROR: Albert Jelinek. I'm 68 years old. Live in Wauwatosa. Single. BS degree. Taught high school biology. No prior jury service.

THE COURT: Thank you.

POTENTIAL JUROR: I'm Kurt Anderson, 44. City of Kenosha. Unmarried. High school grad. And I work for City of Kenosha, Department of Public Works. And never been called for jury service.

THE COURT: Thank you very much.

POTENTIAL JUROR: I'm Sue Falsetti-Bree. I'm 38. I live in Wauwatosa. I'm married. I have a bachelor's of science degree in medical technology. I am a manager, and my husband is a realtor. And I have never served on a jury before.

THE COURT: Thank you very much.

POTENTIAL JUROR: My name is Steve Daubenmier. I'm 60 years old. I live in Waukesha. I'm divorced. I have a college education. I'm a salesperson. And I was on a Waukesha County jury.

THE COURT: Was it a civil or a criminal case?

POTENTIAL JUROR: Civil.

THE COURT: And were you foreperson?

POTENTIAL JUROR: I was not.

THE COURT: And did the jury reach a verdict?

POTENTIAL JUROR: We did.

THE COURT: All right. Thank you.

POTENTIAL JUROR: My name is Michael Enea. I'm 69. I reside in Greendale. I'm married. Education in business management. My occupation, retired. I was on a civil jury. We reached a verdict, but I was not a foreman.

THE COURT: Thank you very much.

POTENTIAL JUROR: Hello, my name is John Bruss. I'm 46. I live in Milwaukee. I'm married. I have one year of college. I am a postal worker. My wife is a musician. I served on a criminal case, and we reached a verdict.

THE COURT: Thank you very much.

POTENTIAL JUROR: My name is Gabriel Free. I live in the Township of West Bend. I'm 35 years. I'm married. My wife works as a beautician in the mall in Brookfield. I'm a retired combat vet, and I've not served on a jury.

THE COURT: All right.

POTENTIAL JUROR: My name is Judy Martinez. I'm 37. I live in Menomonee Falls. I'm married. I do have a college degree. I'm a veterinarian, and my husband is an electrical contractor. I have no prior service.

THE COURT: Thank you.

POTENTIAL JUROR: My name is Lindsey Keinert. I'm 22 years old. I live in Brookfield. I'm not married. I have a bachelor of arts degree. I'm an account coordinator. And I've never served on a jury before.

THE COURT: Thank you again.

POTENTIAL JUROR: My name is Dana Bonelli. I'm 59. I live in Wauwatosa. I'm married to my husband who is a physician. I have a doctorate, and I'm a biblical counselor and teach at a local bible college. I have had no prior jury service.

THE COURT: Thank you very much.

POTENTIAL JUROR: I'm Sandra Dawson. I'm 70. I live in Brookfield. I'm married. I have a college degree. I am currently a homemaker. I have no prior jury service.

THE COURT: Thank you.

POTENTIAL JUROR: My name is Booker Hamilton. Age 75. Live in the city of Milwaukee. Married. My wife -- excuse me -- is in culinary for MATC in Oak Creek. Communication, I have a degree in business management. And occupation, retired.

THE COURT: Thank you.

POTENTIAL JUROR: Good morning. My name is Dennis Meyers. I'm 67 years old. I live in the city of Brookfield. I'm married. I have a bachelor's in business administration. My occupation, I'm retired. I was formally a technical services manager, and I'm retired from the U.S. Army also.

THE COURT: Thank you.

POTENTIAL JUROR: No prior jury experience, Your Honor.

THE WITNESS: My name is Eileen McCreary. I'm 32. I live in Franklin. I'm married. I have a bachelor's degree in social work. I'm a child welfare social worker for Kenosha County. And I have no prior jury service.

THE COURT: Thank you. Is there anyone on the panel who has had any dealings with the United States Attorneys Office or the FBI or any other federal agency such as the IRS or ATF?

POTENTIAL JUROR: I have.

THE COURT: All right, Juror Number 6, would you tell us?

POTENTIAL JUROR: As part of an investigation into a violation of one of the offenders that was on my caseload, I had to work with an ATF agent in gathering some information from -- in order to complete the violation investigation.

THE COURT: And that was as part of your responsibilities as a probation and parole agent?

POTENTIAL JUROR: That's correct.

THE COURT: All right. And as a probation and parole agent, do you work closely with law enforcement officers?

POTENTIAL JUROR: Yes.

THE COURT: And how long have you been doing that work?

POTENTIAL JUROR: Fifteen years.

THE COURT: And as a probation and parole agent are you required from time to time to testify in court?

POTENTIAL JUROR: Absolutely.

THE COURT: Okay. Thank you very much. Is there anyone on the panel who has had any legal training? (No response.) Is there anyone who has worked in any law offices? (No response.) Is there anyone who has worked as a law enforcement officer other than as a probation and parole agent? (No response.) Is there anyone here who has a close relative or a close friend who is in law enforcement? All right, that's Number Two.

POTENTIAL JUROR: I have a brother-in-law who recently retired from the Milwaukee Police Department.

THE COURT: And what was his responsibility?

POTENTIAL JUROR: He worked vice for a while, their group for schools, and he did background checks for new police officers.

THE COURT: And did you talk with your brother-in-law about his work on any kind of a regular basis?

POTENTIAL JUROR: Well, typically when we gathered for family gatherings, yes.

THE COURT: All right. Thank you. Would you pass it down, please.

POTENTIAL JUROR: My father.

THE COURT: Number Four.

POTENTIAL JUROR: My father --

THE COURT: Would you please stand. I will make it easier for the reporter.

POTENTIAL JUROR: My father is a retired police officer.

THE COURT: With what department?

POTENTIAL JUROR: He was chief of police in Pardeeville, Wisconsin.

THE COURT: And as chief of police I gather he had to, from time to time, get involved in arresting people?

POTENTIAL JUROR: Yes.

THE COURT: And as a result of his work in law enforcement, do you have any strong feelings about police officers and their credibility?

POTENTIAL JUROR: No.

THE COURT: Are you inclined to believe a police officer before you would believe, let's say, another member of the community, let's say a neighbor?

POTENTIAL JUROR: I would have to say yes.

THE COURT: All right. Why so?

POTENTIAL JUROR: Because you're supposed to trust police officers, and they're there to serve us and to protect us.

THE COURT: And do you understand that when people come to court and testify each person has to

be judged on the basis of what he or she knows or what he or she sees?

POTENTIAL JUROR: Yes.

THE COURT: Now, if you were to be selected as a juror in this case, you'll be called upon to listen to what police officers might say and as well as what other people might say. Are you saying that if you were called as a juror you would be inclined to believe a police officer regardless of what he or she says as opposed to what someone else says?

POTENTIAL JUROR: I guess I'd have to listen to all the facts and everything that everyone has to say.

THE COURT: So following that analysis, are you, therefore, willing to be openminded --

POTENTIAL JUROR: Yes.

THE COURT: -- in listening to what people have to say?

POTENTIAL JUROR: Yes.

THE COURT: Notwithstanding the fact that your father was the chief of police?

POTENTIAL JUROR: Yes. My father also worked at the Columbia Correctional Institute as the manager of the control room. That's where he retired.

THE COURT: Okay. How long did he do that?

POTENTIAL JUROR: Seven years.

THE COURT: Okay. Thank you.

POTENTIAL JUROR (6): I have a brother that is a corrections officer in Illinois, the state of Illinois.

THE COURT: And is he still working as a corrections officer?

POTENTIAL JUROR (6): Yes.

THE COURT: What are his responsibilities?

POTENTIAL JUROR (6): He is basically now a transporter -- transportation.

THE COURT: Now, considering the fact that your brother is doing that kind of work, do you think that would affect your ability to listen to evidence as a juror in this case?

POTENTIAL JUROR (6): No, it wouldn't affect me.

THE COURT: Have you talked with your brother about the particulars of his work?

POTENTIAL JUROR (6): There, again, in family gatherings once in a while but not very often.

THE COURT: All right. Thank you. Is there anyone else in the first row? In the back row?

POTENTIAL JUROR: I have a good friend --

THE COURT: Please stand. Juror Number 14.

POTENTIAL JUROR: -- retired policeman for Racine County. He's retired.

THE COURT: And do you know what your friend did with Racine?

POTENTIAL JUROR: He was with drug enforcement for a while, he did welfare fraud, he did lots of stuff throughout the years.

THE COURT: Did you talk with him a lot about the particulars of his work?

POTENTIAL JUROR: Just usually during Packer games.

THE COURT: Are you saying you didn't pay attention to the game?

POTENTIAL JUROR: No, no. I didn't pay attention to him really.

THE COURT: All right. We will not be in session on Thursday during the Packer game. I can assure you of that. Is there anyone else in the back? All right. Please stand. Oh, you're Number Eight in the front.

POTENTIAL JUROR: Just slipped my mind, my sister-in-law works for the Town of Oconomowoc Police Department.

THE COURT: What does she do?

POTENTIAL JUROR: She's not an officer. She works in the office, I'm not really sure, over the years; she's been there a long time, reports and things.

THE COURT: Do you have any strong negative feelings about police officers?

POTENTIAL JUROR: No, I don't think so.

THE COURT: What about any especially strong positive feelings about police officers? In other words, are you more inclined to believe a police officer than an ordinary citizen if, say, an officer were to testify or a citizen were to testify?

POTENTIAL JUROR: I don't think so. I think officers are people like everyone else.

THE COURT: Do you understand that even though a witness may be a police officer or another witness may be a non-officer, each witness has to be assessed based on upon what he or she has observed and what he or she can bring to the witness stand?

POTENTIAL JUROR: Your Honor, could you please repeat that?

THE COURT: Do you understand that when witnesses testify you have to assess what each person brings to the stand and look at each witness separately based upon all factors that would go into determining their credibility?

POTENTIAL JUROR: Yes, I do.

THE COURT: All right. Thank you.

POTENTIAL JUROR: My brother has been --

THE COURT: Would you state your number, please?

POTENTIAL JUROR: Number 11.

THE COURT: All right. Go ahead.

POTENTIAL JUROR: My brother has been a police officer for 30 years.

THE COURT: Where is he a police officer?

POTENTIAL JUROR: Delafield, Wisconsin.

THE COURT: Do you know what his responsibilities are?

POTENTIAL JUROR: Patrol, SWAT team, couple other things.

THE COURT: So as a SWAT officer he is especially trained with weapon and tactics, correct?

POTENTIAL JUROR: Yes.

THE COURT: Have you talked to him about the particulars of his work?

POTENTIAL JUROR: Little bit I guess, sure.

THE COURT: I would assume that he has to utilize guns and rifles as part of his work?

POTENTIAL JUROR: Yes.

THE COURT: Does that bother you?

POTENTIAL JUROR: Well, no, because he hunts deer, too.

THE COURT: All right. Do you hunt deer?

POTENTIAL JUROR: No.

THE COURT: Did you dislike deer hunting, or is there something about guns that bothers you?

POTENTIAL JUROR: I don't really care for venison. I'd rather have a steak.

THE COURT: All right. Do we have anyone else in the jury box? Number 27.

POTENTIAL JUROR: Yeah, my son-in-law is a retired past Racine Police Department --

THE COURT: What did he do with Racine as an officer?

POTENTIAL JUROR: He worked vice and regular investigations.

THE COURT: Would you repeat that, please?

POTENTIAL JUROR: He worked in vice, and then he had other police duties, arrests.

THE COURT: Now, as a vice officer did he investigate drug offenses or other crimes?

POTENTIAL JUROR: Mostly drug cases.

THE COURT: And did you talk with him about the particulars of his work?

POTENTIAL JUROR: On and off, like you say, at family gatherings or something like that, he knew this or that about a case. Nothing really specific.

THE COURT: All right. Thank you.

POTENTIAL JUROR: You're welcome.

POTENTIAL JUROR: My brother-in-law is a sheriff in Washington County.

THE COURT: You're number --

POTENTIAL JUROR: Eighteen.

THE COURT: Go ahead.

POTENTIAL JUROR: Patrol and the SWAT team.

THE COURT: And, again, I assume he has to utilize guns and special tactics as part of his work?

POTENTIAL JUROR: Right.

THE COURT: Does that fact bother you?

POTENTIAL JUROR: No.

THE COURT: Do you own any guns or weapons?

POTENTIAL JUROR: No.

THE COURT: Are you a hunter?

POTENTIAL JUROR: No.

THE COURT: Are you a member of any advocacy groups such as the NRA?

POTENTIAL JUROR: No.

THE COURT: All right. Thank you.

POTENTIAL JUROR: Number 29.

THE COURT: All right.

POTENTIAL JUROR: My sister-in-law's brother is a detective at Stevens Point Police Department.

THE COURT: And what exactly is he doing there?

POTENTIAL JUROR: To be totally honest with you, Your Honor, I don't know. All we do is go out and target shoot once in while, and that's about it.

THE COURT: Do you go out and target shoot with him?

POTENTIAL JUROR: Yes.

THE COURT: What kind of weapon do you have?

POTENTIAL JUROR: I have an AR-15 and two .45 Colts.

THE COURT: All right. Are you a member of the NRA or any other advocacy groups?

POTENTIAL JUROR: No, sir.

THE COURT: Did you go deer hunting this year?

POTENTIAL JUROR: No, sir, but I have in the past; and I usually do.

THE COURT: Are you lucky when you go?

POTENTIAL JUROR: I have been a time or two.

THE COURT: I hope you haven't confronted any bears lately in the woods.

POTENTIAL JUROR: No, sir.

THE COURT: All right. Thank you.

POTENTIAL JUROR: My dad is a retired Milwaukee detective, Number 30.

THE COURT: Okay. Thank you. What did he do with the MPD?

POTENTIAL JUROR: He was on the vice squad, so -- I know he did DEA and sexual assault.

THE COURT: And as a result of that, I'm curious about your ability to sit as a juror in this case. Do you feel that you could sit as a juror and assess each witness on the merits of what that witness has to say?

POTENTIAL JUROR: Yes, I do.

THE COURT: Would you be somewhat inclined to believe someone who is a police officer merely because they, like your father, is in law enforcement?

POTENTIAL JUROR: I don't think so. I think I would.

THE COURT: Did you grow up around a lot of police officers?

POTENTIAL JUROR: Yes.

THE COURT: Do you have police officers as close friends?

POTENTIAL JUROR: Not at this point, no.

THE COURT: Do you dislike being around police officers?

POTENTIAL JUROR: No, not at all. They were my parent's friends, but we don't see them very much at all anymore.

THE COURT: All right. Thank you. Is there anyone else? (No response.) Is there anyone on the panel who has ever had an interest in the outcome of any criminal case, that is, have you been a party to any criminal case; have you testified in any criminal cases; have you had any close relatives or family members who have been involved in any criminal cases? Yes, Number Four. I'm sorry, Number Six.

POTENTIAL JUROR: Just as normal course of business for my occupation on the one hand. On the other hand I had a brother-in-law in probably 1980, somewhere in that area, who was actually indicted on a money laundering or mail fraud, something to that effect.

THE COURT: Was that a case here in Wisconsin?

POTENTIAL JUROR: Yes.

THE COURT: Was it a case in this district?

POTENTIAL JUROR: Yes.

THE COURT: As a result of that do you have any sentiments concerning the US Attorneys Office or the law enforcement agencies involved in that matter?

POTENTIAL JUROR: No. I should also probably add that I was subpoenaed for the grand jury on that, and I did testify in front of the grand jury.

THE COURT: And as a result of that, appearing before the grand jury, do you have any feelings about the grand jury process?

POTENTIAL JUROR: No, nothing either way.

THE COURT: All right. Were you upset about the outcome of the case your relative was involved in?

POTENTIAL JUROR: No. The facts spoke for themselves.

THE COURT: All right. Thank you. Is there anyone else? We'll come back to you in the front row, Number Eight. Number 12.

POTENTIAL JUROR: I testified in a drug trafficking case.

THE COURT: And where was that?

POTENTIAL JUROR: It was in Ozaukee County.

THE COURT: What did you think of that experience?

POTENTIAL JUROR: It was definitely interesting.

THE COURT: All right. Did it bother you?

POTENTIAL JUROR: No.

THE COURT: And were you disappointed in the outcome of the case?

POTENTIAL JUROR: I was just a witness. It didn't really bother me either way.

THE COURT: Did you stick around for the verdict?

POTENTIAL JUROR: I did not, no.

THE COURT: Was it a trial to the court or -- Was it a trial in front of a court or in front of a jury?

POTENTIAL JUROR: It was in front of the court.

THE COURT: All right. Thank you. Number Eight.

POTENTIAL JUROR: Your Honor, you may have noticed I have a tough time following things, but I just wanted to make sure it pertains. I was arrested once, so I was before a judge. Is that in -- Is that what you're asking? I don't know the description of what --

THE COURT: Well, tell me, how did that case turn out as far as you were concerned?

POTENTIAL JUROR: It was -- It wasn't a trial. I just was arrested and held and then went before a judge and was fined. It was -- I believe the terms was interference with sign or signal.

THE COURT: All right.

POTENTIAL JUROR: It was 1974, and I can't really tell you much more about that other than it wasn't -- I wasn't driving a vehicle at the time.

THE COURT: Did you feel that you were treated fairly in that -- during that process?

POTENTIAL JUROR: Probably, yeah.

THE COURT: But you're not sure?

POTENTIAL JUROR: Well, I paid a fine and was glad to get out of there; and I'm -- I don't know that it -- I'm sure that, according to your guidelines, it was going to be something less than a year. Obviously I think I paid under $100 fine and left; so it wasn't anything that would, you know -- the questionnaire asked about more than a year.

THE COURT: Tell me, do you feel that the officers involved in that case treated you proper?

POTENTIAL JUROR: Sure. Yes, I do.

THE COURT: Do you have any feelings about how the court dealt with the matter?

POTENTIAL JUROR: No, nothing stands out.

THE COURT: So it's kind of ancient history?

POTENTIAL JUROR: Right.

THE COURT: All right. Thank you. Is there anyone in the back? Number 17.

POTENTIAL JUROR: Judge, I was involved in a couple arbitration hearings. I don't know if that qualifies for anything. One had to deal with collecting a receivable from a person, another one about a termination; so I don't know if you have any questions about that.

THE COURT: Well, tell me, were you required to actually testify?

POTENTIAL JUROR: Yes.

THE COURT: During that process did you have any strong feelings about the way that you were treated by the lawyers in the case?

POTENTIAL JUROR: No. It was fair. An arbitration is an arbitration, so.

THE COURT: All right. Thank you. Do we have anyone else? (No response.) Now, I do ask that you listen to these names. These people may be mentioned or may appear in this case. If you know anyone of these people, please let us know. Chad Boyack, B-O-Y-A-C-K, a Milwaukee police officer; Cory Washington, a Milwaukee police officer; Anthony Randazzo, -R-A-N-D-A-Z-Z-O; Carrington Ross; Tracie Dansby; Sarah Decorah. Do any of you know these people? (No response.)

Are there any jurors who know one another? Do any of you work with other jurors or have any

association with other persons on the jury panel? Yes. Number 22.

POTENTIAL JUROR: Juror Number 11, we used to work together.

THE COURT: All right. Where did you work together?

POTENTIAL JUROR: At the Tuckaway Post Office.

THE COURT: All right. Thank you. By the way, does anyone know a Kenneth Hardy who is with the Bureau of Alcohol, Tobacco and Firearms?

MS. BLACKWOOD: It's Handy, Judge, -H-A-N-D-Y.

THE COURT: Handy. All right. Kenneth Handy. All right. Is there anyone on the panel who has any strong feelings about the judicial system in general or the jury system? (No response.)

Is there anyone on the panel who as a result of any personal philosophy or religious belief would find it difficult to serve as a juror? (No response.)

Now, one of the things that happens during the course of any trial is the Court must give you instructions. In this particular case, instructions will be given to you; and the jury is to follow the instructions. Each instruction is important.

Is there anyone on the panel who would have any difficulty following instructions that are provided by the Court? (No response.) Is there anyone here who

has any strong feelings about our gun laws? Yes, Number 29.

POTENTIAL JUROR: I feel that our gun laws in this country are a little strict. It's says in our constitution we should be allowed to have them. Some states do; some states don't, and I think it's a tragedy.

THE COURT: Now, in this particular case, as you may have noted, it is charged that the defendant who had been previously convicted of a crime punishable by imprisonment for a term exceeding a year, knowingly possessed a firearm which prior to his possession of it had been transported in interstate and foreign commerce; and that the gun is described as a CZ, model 70, 7.65 pistol bearing a particular serial number.

Does that fact in and of itself make it difficult for you to -- Well, let me state it differently. Does that fact cause you to believe that you would not be able to serve as a juror in this case?

POTENTIAL JUROR: No, Your Honor, it doesn't.

THE COURT: Do you believe that that is contrary to any strong beliefs you have concerning firearms?

POTENTIAL JUROR: No, sir, it doesn't. There are certain laws that do apply.

THE COURT: So are you saying that you believe you would follow the law even though you may have

some strong feelings about some aspects of our national gun laws?

POTENTIAL JUROR: Yes, sir. Just because I don't like them don't mean there shouldn't be a guideline.

THE COURT: All right. Thank you. Is there anyone else?

POTENTIAL JUROR: Number 35. I believe that the Second Amendment is an individual right, and that law-abiding citizens are allowed and should be allowed to possess firearms for legal purposes only.

THE COURT: All right. Thank you. Is there anyone else? (No response.) Ms. Blackwood, you may proceed. Do you have some questions of the panel?

MS. BLACKWOOD: I don't, Your Honor. Thank you very much.

THE COURT: Mr. Erickson?

MR. ERICKSON: I do. A few individual questions, some follow-up. Juror -- I'm going to do it by number; it's easier. Juror Number 7, you said you were retired. What did you do before you were retired?

THE COURT: Please stand.

POTENTIAL JUROR: I worked for Social Service.

THE COURT: You worked for Social Service?

POTENTIAL JUROR: Yeah.

MR. ERICKSON: What specifically did you do?

POTENTIAL JUROR: Engineering department.

MR. ERICKSON: I'm sorry?

POTENTIAL JUROR: Engineering department.

MR. ERICKSON: Engineering department?

POTENTIAL JUROR: Yeah.

MR. ERICKSON: Thank you. Juror Number 12, you told us that you had a college education. What degree do you have?

POTENTIAL JUROR: I have a bachelor.

MR. ERICKSON: In what area?

POTENTIAL JUROR: Business administration.

MR. ERICKSON: Okay, thank you. Juror 13, your husband taught at WCTC. What did he teach there?

POTENTIAL JUROR: What?

MR. ERICKSON: What did he teach there?

POTENTIAL JUROR: He was a math teacher.

MR. ERICKSON: Math teacher. Thank you. And, Juror Number 10, what did your wife do before she retired?

POTENTIAL JUROR: She was at one time an art teacher, associate's degree in teaching.

MR. ERICKSON: In high school?

POTENTIAL JUROR: No, she taught in elementary.

MR. ERICKSON: Thank you. And, Juror Number 14, you said that your partner works for the Department of Corrections, correct?

POTENTIAL JUROR: Correct.

THE COURT: What institution?

POTENTIAL JUROR: Racine. She works at RYOC in Racine and Ellsworth.

MR. ERICKSON: Racine Youth Offender, and Ellsworth I think --

POTENTIAL JUROR: Woman's.

MR. ERICKSON: Woman's. Thank you. And, Juror Number 23, where did you teach high school?

POTENTIAL JUROR: Milwaukee Pulaski High School.

MR. ERICKSON: And, Juror 27, where are you retired from, sir?

POTENTIAL JUROR: I'm retired from Praxair. I worked for Babcock and Wilcox before that.

MR. ERICKSON: What type of job did you have?

POTENTIAL JUROR: Supervisor at Babcock and Wilcox, and I was a forklift operator at Praxair.

MR. ERICKSON: Thank you. Just a few more questions. I'm just going to ask this generally. The judge asked some specifics -- some specifics. Is there anyone here that -- you heard the Judge's comment or questions regarding judging police officer's testimony; and just generally, the entire panel, is anyone here who would have a -- would anybody here give more credence to someone who testified simply because they were a police officer? (No response.)

Also, you are going to hear -- you've heard already that Mr. McMath, my client, has been convected of a crime. You also are going to be instructed ultimately that the fact that he's been convicted of a crime is not evidence of his guilt in this case. If you are instructed will everybody follow that instruction? (No response.)

Also, as you can see, my client is African-American. Does the fact that he is African-American cause anyone on the panel any type of feeling that they would be unable to judge this case fairly or impartially for any reason? (No response.) Thank you, Your Honor.

THE COURT: I do want to make several statements and ask some questions. I mentioned during the course of our voir dire that there was an indictment issued in this case, and that the indictment charged Mr. McMath with having committed a crime.

Is there anyone who does not appreciate the fact that Mr. McMath is presumed innocent unless and until the Government has proven him guilty by competent evidence beyond a reasonable doubt? Is there anyone who has any difficulty with that concept? (No response.) Does everyone understand than an indictment is merely a way of bringing someone into court? It is an allegation. It is not proof of any crime having been committed.

Is there anyone on the panel who knows of any reason why he or she might have difficulty serving as a juror in this case? (No response.) Is there anyone on the panel who would be uncomfortable if someone with their mindset -- mindset were serving as a juror in a case where you were a party? (No response.)

I'd like to see counsel in chambers. Mr. McMath, if you would like to come, you may join us.

THE COURT: Let the record show we are in the jury room with Mr. McMath and counsel. This is the second phase of jury selection. At this point what I'd like to ask is whether or not there are additional questions that should be asked of any particular members of the panel before we determine challenges for cause, if any.

MR. ERICKSON: Not from the defense.

MS. BLACKWOOD: No, Your Honor.

THE COURT: All right. Are there any challenges for cause?

MR. ERICKSON: I think the only person would be 22, the fellow who has the surgery on Wednesday.

THE COURT: Ms. Blackwood?

MS. BLACKWOOD: I suppose that could be an issue, but we're predicting we'll be done today. I'm calling two officers -- three officers. The third one is going to be very brief, just as to the overhead lighting. We have stipulations on everything. The defendant may testify, but I am certain that our testimony will be concluded today, maybe even closings, so.

MR. ERICKSON: I mean, just in the sake of caution since we have plenty of jurors.

THE COURT: Well, we will have an alternate; so if that person is selected, we have a way of addressing that problem. Inasmuch as this is scheduled to be a one-day to two-day trial, it appears to me that there's no reason to excuse Number 22; but I do appreciate the concern. Under all the circumstances, I would agree with you. Is there anything else with respect to cause?

MR. ERICKSON: No, not from the defense.

MS. BLACKWOOD: Not from the Government.

THE COURT: All right. Then what we will do then is select the 31 jurors from the group that we have by randomly selecting them from all of the numbers; and then from that point we will go through the selection process that we described at our final pretrial, and the 13th juror that has been seated will then be eliminated after all the evidence

and after the instructions and argument if there's a need to excuse someone at that point. Is that still satisfactory to both sides?

MS. BLACKWOOD: So we're not just going to take the first 31?

THE COURT: No.

MS. BLACKWOOD: Okay. Going to be confusing because you're going to draw them out of a box then? Okay. Will they be by name or one through --

THE COURT: By number.

MS. BLACKWOOD: Okay.

THE COURT: The numbers will be mixed up, and sometimes the parties will select the numbers out, or the clerk can pull the numbers, or the defendant can pull the numbers, whichever is satisfactory.

MR. ERICKSON: I'm comfortable with the clerk doing that.

THE COURT: Or if you prefer we can also take the first 31 persons.

MS. BLACKWOOD: The first 31 would just be easier because I've got it charted. I don't know if you have it charted out.

THE COURT: Would that be preferable, Mr. Erickson?

MR. ERICKSON: No, I would prefer to do it randomly.

THE COURT: All right, let's do it randomly --

MR. ERICKSON: Do you want to --

THE COURT: That's what we do in most cases. Do you want to pull the numbers out?

THE DEFENDANT: Yeah.

THE COURT: All right. Do you have all 36?

THE CLERK: I have 1 through 36. I'm taking the numbers out that won't be part of that group. Take out six?

MS. BLACKWOOD: Did we start with 36?

THE CLERK: Thirty-six. Going to be 13, correct?

THE COURT: Pick out five randomly. Those will be eliminated.

THE DEFENDANT: Take out how many?

THE COURT: Take out five. Take them one at a time. Six, 19, 28, 21 and 27. All right. Do you want to go out into the jury room to do your selecting?

MS. BLACKWOOD: Yes.

MR. ERICKSON: yes.

THE COURT: Okay. In fact, what I will do is excuse these. Call Judge Stadtmueller's courtroom

to see if they will need them at this point. Off the record.

(The following proceedings were held in the courtroom in the presence of the jury.)

THE CLERK: The following jurors may return to the jury assembly room; Number 6, Mr. Dec; Number 19, Mr. Borosch; Number 21, Mr. Crawford; Number 27, Mr. Enea and Number 28, Mr. Bruss.

THE COURT: Thank you very much. There is another jury trial is also scheduled in another courtroom today. So those jurors are being sent to that courtroom.

We're not about to launch into the last phase of jury selection. During this period of the trial the parties will be exercising what are called their peremptory challenges. After they're done with the peremptory challenges, the Court will take a short break, and then we will start with the testimony in the case as well as any opening statements the parties may wish to make.

(Jury instructions were given.)

THE CLERK: The following persons have been selected to serve as jurors in this case, please stand as I call your name and number: Juror Number 2, Mr. Rick Haagensen; Number 10, Mr. David McClelland; Number 12, Ms. Beverly Hubing; Number 13, Ms. Dorelle Bailey; Number 14, Ms. Ann Britzke; Number 16, Mr. Damon Gross; Number 20, Mr. Bryon Beatka, Number 22, Mr. Gary Gertz; Number 23, Mr. Albert Jelinek, Juror Number 25,

Ms. Sue Falsetti-Bree; Number 26, Mr. Steven Daubenmeir; Number 33, Ms. Sandra Dawson and Number 34, Mr. Booker Hamilton.

THE COURT: If your names and numbers were not called, please move to the back of the courtroom. Those of you in the back whose names and numbers were called, please move to the front and take a seat in the jury box.

THE CLERK: Please stand as I call you number and name. Number 2, Mr. Haageson; Number 10, Mr. McClelland; Number 12, Ms. Hubing; Number 13, Ms. Bailey; Number 14, Ms. Britzke; Number 16, Mr. Gross; Number 20, Mr. Beatka; Number 22, Mr. Gertz; Number 23, Mr. Jelinek; Number 25, Ms. Falsetti-Bree; Number 26, Mr. Daubenmier; Number 33, Ms. Dawson; Number 34, Mr. Hamilton.

THE COURT: Please be seated. Would the parties please approach?

(The following proceedings were held at sidebar outside the presence of the jury.)

MR. ERICKSON: I have an issue about Juror 7, the African-American.

THE COURT: All right.

MR. ERICKSON: So, I mean, if you want to -- Do you want me to do it now?

THE COURT: What is the issue?

MR. ERICKSON: Yeah, I was thinking under Batson, obviously he's African-American. He was

struck. The only information we had about him is he was retired. He worked at Social Services, janitorial. There's other jurors left on this jury that are retired. Under similar circumstances I think it would be incumbent upon the Government to raise a racially neutral factor at this point.

MS. BLACKWOOD: Your Honor, there are two African-Americans that were on the panel; one was struck. There is no pattern of discrimination that's been demonstrated.

MR. ERICKSON: Your Honor, even though one is left on, there still, I think, has to be a race neutral factor and there's not here.

MS. BLACKWOOD: Race neutral factor is expression on his face. That's all I can say. He looked angry and not happy to be here.

MR. ERICKSON: I think pretty much the whole jury looked like that.

MS. BLACKWOOD: I disagree. I didn't see that expression.

MR. ERICKSON: There were several people that had the same expression.

THE COURT: The Batson challenge is denied.

(The following proceedings were held in the courtroom in the presence of the jury.)

THE COURT: Those of you who were not selected to serve on the jury in this case may return to the jury assembly room. Thank you very much for

your participation in this aspect of the case. There is another case scheduled to trial today, and you may be needed there. Have a good morning. Those of you who are on the panel, please rise and take the oath.

(The jurors were first duly sworn under oath.)

THE COURT: You may go to the jury room for a couple moments and relax and place your things there. You will get some preliminary instructions from the bailiff. You may not have any cell phones or other electronic devices here in the courtroom. Please rise.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

| | |
|---|---|
| UNITED STATES OF AMERICA | **JUDGMENT IN A CRIMINAL CASE** |
| v. | Case Number: 07-CR-154 |
| **ROBERT CORDELRO MCMATH** | USM Number: 09029-089 |

**Thomas J. Erickson**
**Defendant's Attorney**

**Elizabeth M. Blackwood**
**Assistant United States Attorney**

THE DEFENDANT:

☐ pleaded guilty on _____ as to the _____

☐ pleaded nolo contendere to count(s)_____ which was accepted by the court.

☑ after a plea of not guilty, a trial was held on November 26, 2007, and the jury returned a verdict finding the defendant guilty as to count one of the indictment.

The defendant is adjudicated guilty of the following offense:

| **Title & Section** | **Nature of Offense** |
|---|---|
| **18 U.S.C. §§ 922(g)(1) and 924(a)(2)** | **Felon in possession of a firearm** |
| **Offense Ended** | **Count** |
| **May 8, 2007** | **One** |

The defendant is sentenced as provided in Pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____

☐ Count(s)_____ of the _____ ☐ is ☐ are dismissed as to this defendant on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of material changes in economic circumstances.

May 8, 2008
Date of Imposition of Judgment

/s/
Signature of Judicial Officer

**C. N. Clevert, Jr., U.S. District Judge**
Name & Title of Judicial Officer

5/9/08
Date

**Defendant: Robert Cordelro McMath**
**Case Number: 07-CR-154**

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to a term of **sixty-three (63) months imprisonment as to the one-count Indictment.**

☑ The court makes the following recommendations to the Bureau of Prisons:

Participation in Inmate Financial Responsibility Program to facilitate payment of Special Assessment;
Placement in the "500 Hour" Drug Treatment Program; and
Placement at a facility as close as possible to Milwaukee, WI

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at ___ ☐ a.m. ☐ p.m. on_____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

**Defendant: Robert Cordelro McMath**
**Case Number: 07-CR-154**

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three **(3) years as to the one-count Indictment.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess any controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as directed.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer.

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as in informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

**Defendant: Robert Cordelro McMath**
**Case Number: 07-CR-154**

## ADDITIONAL TERMS OF SUPERVISED RELEASE

1) **Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.**

2) **The defendant shall not possess any firearms or other dangerous weapons, as such possession will result in revocation of the supervision term and subject the defendant to a further term of imprisonment.**

3) **Pursuant to the Violent Crime Control and Law Enforcement Act of 1994, the defendant shall not illegally possess or unlawfully use any controlled substance, as such possession or use will result in revocation of the supervision term and subject the defendant to a further term of imprisonment.**

4) **The defendant shall not consume any alcohol while on supervised release.**

5) **The defendant shall work in any tavern, liquor store, or other establishment where alcohol is the primary source of revenue.**

6) The defendant shall not associate with any member, prospect, or associate member of the Gangster Disciple Gang or any other gang. The defendant shall have no communication with whatsoever with the Gangster Disciple Gang or any other gang.

7) The defendant shall cooperate in the collection of DNA under the guidance and supervision of the supervising probation officer.

8) The defendant shall participate in a program of testing, to include not more than six (6) urinalysis tests per month, and residential or outpatient treatment for drug and or alcohol abuse, as directed by the supervising probation officer, until he is released from such program by the supervising probation officer.

9) The defendant shall provide access to all financial information requested by the supervising probation officer including, but not limited to, copies of all federal and state income tax returns. All tax returns shall be filed on time with copies provided to the supervising probation officer immediately upon filing.

10) To the extent that the Special Assessment is still due and owing, the defendant shall make payments of not less than $5.00 per month and shall not obtain any new credit, including the leasing of property, or use existing credit resources without the prior

**approval of his supervising probation officer.**

**11) The defendant shall obtain his GED or HSED if he has not already done so.**

**Defendant: Robert Cordelro McMath**
**Case Number: 07-CR-154**

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Fine | Restitution | Buy Money |
|---|---|---|---|---|
| **Totals:** | **$100.00** | None | None | None |

☐ The defendant shall repay the buy money as a condition of supervised release.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss* | Restitution Ordered | Priority or Percentage |
|---|---|---|---|
| **Totals:** | $____ | $_____ | |

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Defendant: Robert Cordelro McMath**
**Case Number: 07-CR-154**

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows.

A ☒ Lump sum payment of $100.00 for the Special Assessment is due immediately. If the defendant cannot make full and immediate payment, then the balance is to be paid

☐ not later than _____, or

☒ in accordance ☐ C, ☐ D, ☐ E or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of ___ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of ___(e.g., months or years), to commence (e.g., 30 or 60 days) after release

from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties: The defendant is to participate in the Inmate Financial Responsibility Program to facilitate payment of the Special Assessment.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names, Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit his/her interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.